TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted]263

H. W. HESS, PLAINTIFF IN ERROR,

vs.

LEO PAWLOSKI, MINOR, PROCEEDING BY HIS FATHER AND NEXT FRIEND, STANISLAW PAWLOSKI

IN ERROR TO THE SUPERIOR COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS

FILED JANUARY 9, 1926

(31,599)

(31,599)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 876

H. W. HESS, PLAINTIFF IN ERROR,

vs.

LEO PAWLOSKI, MINOR, PROCEEDING BY HIS FATHER AND NEXT FRIEND, STANISLAW PAWLOSKI

IN ERROR TO THE SUPERIOR COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1926

[fol. 1] **IN SUPERIOR COURT OF WORCESTER COUNTY**

No. 27152

LEO PAWLOSKI, p. p. a.,

v.

H. W. HESS

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—
Filed December 18, 1925

To the Honorable Walter Perley Hall, Chief Justice of the Superior Court for the Commonwealth of Massachusetts:

Respectfully represents your petitioner H. W. Hess, a resident of Philadelphia, Pennsylvania, that on the second day of November, 1925 the Superior Court for the County of Worcester in the Commonwealth of Massachusetts made and entered a final judgment in the above entitled action in favor of the above respondent and against your petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors filed with this petition.

[fol. 2] Your petitioner further says that the said Superior Court is the highest court of record in said Commonwealth in which a final judgment could be had and is the only court which can issue judgment thereon and that in the said suit certain Federal questions have been raised by the said judgment all of which fully appear in the records and proceedings of the case and are specifically set forth in the assignment of errors filed herewith.

Wherefore the undersigned, being plaintiff-in-error, prays that a writ of error may issue in his behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and that further proceedings may be stayed upon the approval of a proper bond and that a transcript of the record, proceedings and papers in this suit duly authenticated may be sent to the Supreme Court of the United States.

By His Attorneys, Choate, Hall & Stewart.

Allowed: Walter Perley Hall, Chief Justice Superior —, Commonwealth of Mass.

[File endorsement omitted.]

[fol. 3] In Superior Court of Worcester County

[Title omitted]

Assignments of Error—Filed December 18, 1925

Now comes H. W. Hess, a resident of Philadelphia, Pennsylvania, defendant in the above-entitled case, being plaintiff in error herein, and with his petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in the records and proceedings in the above entitled case; and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

This court erred in holding and deciding that Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section 2 of Ch. 431, Acts of 1923 is valid, and that service made on the defendant, plaintiff in error, in compliance with the provisions of the said sections, was valid service. The validity of these provisions was denied and drawn in [fol. 4] question by the said defendant, plaintiff in error, on the ground of their being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

1. This court erred in denying the defendant's motion to dismiss the action, said motion having been made on the ground that this court had acquired no jurisdiction over the defendant, plaintiff in error, and that the attempted service of process on the said defendant, plaintiff in error, made in compliance with the provisions of Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section 2 of Ch. 431, Acts of 1923, was invalid under and in contravention of the Constitution of the United States, and particularly Section 1 of Article 14 of the Amendments thereto.

2. This court erred in overruling the defendant's answer in abatement, said answer in abatement having been made on the ground that this court had acquired no jurisdiction over the defendant, plaintiff in error, and that the attempted service of process on the said defendant, plaintiff in error, made in compliance with the provisions of Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section [fol. 5] 2 of Ch. 431, Acts of 1923, was invalid under and in contravention of the Constitution of the United States, and particularly Section 1 of Article 14 of the Amendments thereto.

3. This court erred in denying at the trial the second request for ruling filed by the defendant, plaintiff in error, as follows:

"2. The attempted service of process on the defendant in this action is invalid under the Constitution of the United States, and particularly under Section 1 of Article 14 of the amendments thereto."

4. This court erred in denying at the trial the third request for ruling filed by the defendant, plaintiff in error, as follows:

"3. The attempted service in this case, if made the basis of a judgment, amounts to depriving the defendant of his property without due process of law."

5. This court erred in holding that Section 3 of Ch. 90, General Laws of Massachusetts, as amended by Section 2 of Ch. 431, Acts of 1923, was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States as depriving persons or this defendant, plaintiff in error, of property without due process of law when service made in compliance with the said sections was made the basis of a judgment by this court.

6. This court erred in holding that the said sections did not constitute a denial to the citizens of other States and to this defendant of privileges and immunities of the citi- [fol. 6] zens of the Commonwealth of Massachusetts in contravention of Article 4, Section 2 of the Constitution of the United States.

For which errors the said plaintiff in error prays that the judgment of the said Superior Court for the Commonwealth

of Massachusetts be reversed and that the attempted service of process on this defendant, made in compliance with Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section 2 of Ch. 431, Acts of 1923, be held invalid.

H. W. Hess, by Choate, Hall & Stewart, Attorneys.

[File endorsement omitted.]

[fol. 7] In Superior Court of Worcester County

Writ of Error—Filed December 18, 1925

United States of America, ss:

(Seal of the United States District Court, Massachusetts.)

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Worcester, within and for the County of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Leo Pawloski, minor, proceeding by his father and next friend, Stanislaw Pawloski, of Worcester, Massachusetts, Plaintiff, and H. W. Hess, of Philadelphia, Pennsylvania, Defendant, in an action of tort, wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the Fourteenth day of December, in the year of our Lord one thousand nine hundred and twenty-five.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by Walter Perley Hall, Chief Justice of the Superior Court of Massachusetts.

[fol. 8] Citation, in usual form, showing service on Harry J. Meleski, filed December 18, 1925, omitted in printing.

[fols. 9-11] Bond on writ of error for $1,500, approved and filed December 18, 1925, omitted in printing.

[fol. 12] In Superior Court of Worcester County

Writ of Attachment and Sheriff's Return

Commonwealth of Massachusetts,
Worcester, ss:
(L. S.)

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of H. W. Hess of Philadelphia in the State of Pennsylvania, to the value of Five Thousand dollars of the said Defendant (if

he may be found in your precinct) so that you have him before our Justices of our Superior Court, at Worcester within and for our said County of Worcester, on the first Monday of December next; then and there, in our said Court to answer unto Leo Pawloski, p. p. a. Stanislaw Pawloski ofthe City and County of Worcester in the Commonwealth of Massachusetts. In an action of tort.

To the damage of said Plaintiff, as he saith, the sum of Five Thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness Walter Perley Hall, Esquire, at Worcester, the 9th day of November in the year of our Lord one thousand nine hundred and twenty-three.

Frank L. Dean, Clerk.

[fol. 13] SUFFOLK, ss:

Boston, November 14th, 1923.

By virtue of this Writ, I this day attached a chip as the property of the within named defendant H. W. Hess, and afterwards on the same day I summoned said defendant to appear and answer at Court as within directed by delivering into Frank A. Goodwin, Esq., Registrar of Motor Vehicles for the Commonwealth of Massachusetts, his agent, a summons of this writ, together with two dollars paid to the Registrar.

In the service hereof it was necessary and I actually used a motor vehicle 3 miles.

Fees:

Service	1 00
Travel	2 00
Pd. Registrar	2 00
M. Vehicle	45
	$5 45

Richard F. Sweeney, Deputy Sheriff.

A Copy. Attest: Frank L. Dean, Clerk.

[fol. 14] In Superior Court of Worcester County

[Title omitted]

Declaration—Filed December 3, 1923

Count 1. And now comes the plaintiff in the above entitled action and says that the defendant so negligently and unskilfully drove a motor vehicle in a public highway, called Millbury Street, in Worcester, in the County of Worcester and the Commonwealth of Massachusetts and that by reason thereof the said motor vehicle struck the plaintiff who was then properly crossing the said highway, whereby the plaintiff was thrown down and his right leg broken and was otherwise much injured and was prevented from attending school, suffered great pain, both physically and mentally and expense was incurred for medicine and medical attendance, all to the plaintiff's great damage.

[fol. 15] Count 2. And the plaintiff further says that the defendant so recklessly, wilfully and wantonly and in disregard of human life, drove a motor vehicle in a public highway, called Millbury Street, in Worcester, in the County of Worcester and the Commonwealth of Massachusetts, and that by reason thereof the said motor vehicle struck the plaintiff who was then properly crossing the said highway, whereby the plaintiff was thrown down and his right leg broken and was otherwise much injured and was prevented from attending school, suffered great pain, both physically and mentally and expense was incurred for medicine and medical attendance, all to the plaintiff's great damage.

Leo Pawloski, p. p. a., Stanislaw Pawloski, by Their Atty., H. J. Meleski.

[File endorsement omitted.]

[fol. 16] In Superior Court of Worcester County

[Title omitted]

Affidavit of Compliance—Filed December 3, 1923

In accordance with Chap. 431, Sec. 2 of the Acts of 1923, I hereby depose under oath and say that I have complied with the provisions thereof. This affidavit is made a part of the plaintiff's declaration, so also the defendant's return receipt appended hereto is hereby made a part of the plaintiff's declaration in accordance with the said provisions of Chap. 431, of the Acts of 1923.

Leo Pawloski, p. p. a. Stanislaw (his x mark) Pawloski.

Witness: H. J. Meleski.

Commonwealth of Massachusetts,
Worcester, ss:

December 3, 1923.

Then personally appeared before me the above named Stanislaw Pawloski and made oath that the foregoing state-
[fol. 17] ments made by him are true.

Harry J. Meleski, Notary Public. (Seal.)

Copy

(Postmark).

Post Office Department, Official Business.

Registered Article No. 22416

Return to (Name of sender:) H. J. Meleski, (Street and number or Post Office Box:) 1011 Park Bldg., Worcester, Massachusetts.

Copy

Return Receipt

#500. 46686.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

(Signature or name of addressee:) H. W. Hess.
(Signature of addressee's agent:) Mrs. H. W. Hess.

Date of delivery: 11/12, 1923.
Form 3811.

[File endorsement omitted.]

[fol. 18] In Superior Court of Worcester County

[Title omitted]

Answer in Abatement—Filed December 15, 1923

The defendant, appearing specially and solely for the purpose of contesting jurisdiction, says that this Court has no jurisdiction over the defendant in this action or otherwise, and that process in this action has not been properly or lawfully served upon the defendant. In support of this answer in abatement, the defendant says that the attempted services of process on the defendant in this action is invalid under the Constitution of the United States and particularly under Section 1 of Article XIV of the Amendments thereto, and is in conflict with and in violation of the provisions of said Constitution and said Amendments, especially in that said attempted service, if sustained and if [fol. 19] made the basis of a judgment by this Court thereon, would amount to depriving this defendant of his property without due process of law.

Wherefore the defendant, appearing specially, as aforesaid for this purpose, says that he ought not to be held to answer in this action, and that the plaintiff's writ be abated.

H. W. Hess, by Choate, Hall & Stewart, Attorneys,
Appearing Specially.

[File endorsement omitted.]

Jan. 17, 1924. Overruled.
Attest: Stanley W. McRell, Asst. Clerk.

[fol. 20] In Superior Court of Worcester County

[Title omitted]

Motion to Dismiss—Filed December 15, 1923

The defendant, appearing specially and solely for the purpose of contesting jurisdiction and without waiving its answer in abatement, says that this Court has no jurisdiction over the defendant in this action or otherwise, and that process in this action has not been properly or lawfully served upon the defendant. In support of this motion to dismiss, the defendant says that it appears from the record or pleadings that the defendant is a resident of Philadelphia in the State of Pennsylvania; that no personal service has been made upon him and that no property belonging to him within the Commonwealth of Massachusetts has been trusteed; that the attempted service of process on the defend-
[fol. 21] ant in this action is invalid under the Constitution of the United States and particularly under Section 1 of Article XIV of the Amendments thereto, and is in conflict with and in violation of the provisions of said Constitution and said Amendments, especially in that said attempted service, if sustained and if made the basis of a judgment by this Court thereon, would amount to depriving this defendant of his property without due process of law.

Wherefore the defendant, appearing specially as aforesaid for this purpose, says that he ought not to be held

to answer in this action and asks that the action be dismissed.

H. W. Hess, by Choate, Hall & Stewart, Attorneys, Appearing Specially.

[File endorsement omitted.]

Jan. 17, 1924. Mo. denied. Attest: Stanley W. McRell, Asst. Clerk.

[fol. 22] In Superior Court of Worcester County

[Title omitted]

Report—Filed January 31, 1924

This is an action of tort brought by Leo Pawloski, p. p. a., a resident of Worcester, Massachusetts, against H. W. Hess, a resident of Philadelphia, Pennsylvania, on account of an automobile accident happening in Worcester upon Sept. 27, 1923.

The plaintiff in bringing his action has complied with the provisions of Chapter 431, Section 2, Acts, 1923, amending General Laws, Chapter 90, Section 3, by leaving a copy of the process, with the required fee, in the office of the registry of motor vehicles for this Commonwealth, and by sending to the defendant in Philadelphia a copy of the process by registered mail. The defendant's return receipt and the plaintiff's affidavit of compliance were appended to the writ and entered with the declaration as required by the provisions of Chapter 431, Section 2.

[fol. 23] The defendant, appearing specially, filed an answer in abatement and motion to dismiss. Both the answer in abatement and the motion to dismiss were argued before me in Session Without a Jury at Worcester on January 14, 1924, and on January 17, 1924 I entered an order denying the motion to dismiss and overruling the answer in abatement.

Being of the opinion that the correctness of this order ought to be determined by the full court before any further proceeding in the trial Court, I hereby report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties.

Copies of the plaintiff's writ and declaration, with appendices, and the defendant's answer in abatement and motion to dismiss are annexed hereto and are made a part of this report.

Alonzo R. Weed, Justice Superior Court.

Assented to: Choate, Hall & Stewart, Attorneys for Defendant, Appearing Specially. Harry J. Meleski, Attorney for Plaintiff.

(Copies of the plaintiff's writ and declaration, with appendices, and the defendant's answer in abatement and motion to dismiss precede.)

[File endorsement omitted.]

[fol. 24] In Supreme Judicial Court of Massachusetts

Leo Pawloski, p. p. a.,

vs.

H. W. Hess

Pending in the Superior Court for the County of Worcester

Order Affirming Order Denying Motion to Dismiss and Overruling Answer in Abatement—Filed September 22, 1924

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Order denying motion to dismiss and overruling answer in abatement affirmed.

By the Court:

Walter F. Frederick, Clerk.

September 19, 1924.

Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made.

[File endorsement omitted.]

[fol. 25] In Superior Court of Worcester County

[Title omitted]

Verdict—April 3, 1925

The Jury find for the Plaintiff and assess damages in the sum of $500, five hundred dollars.

Mark O. Carroll, Foreman.

[fol. 26] 27152. Verdict of the Jury. April 3, 1925. Jurors: Mark O. Carroll, Philip S. Devlin, Peter J. McEntee, Elias J. Dupuis, Edwin A. Walsh, E. Wayne Boyd, Frank Bertrand, Charles E. Ray, Richard G. Gaskill, Amedee Racicot, John T. Mahan, George W. Ferron. Attest: William G. Pond, Asst. Clerk.

A Copy. Attest: Frank L. Dean, Clerk.

[fol. 27] In Superior Court of Worcester County

[Title omitted]

Substitute Bill of Exceptions—Filed July 25, 1925

This is an action of tort brought by Leo Pawloski, p. p. a., a resident of Worcester, Massachusetts, against H. W. Hess, a resident of Philadelphia, Pennsylvania on account of an automobile accident happening in Worcester upon September 27th, 1923.

The plaintiff brought his action against a foreign defendant in accordance with the provisions of Chapter 431, Section 2, Acts of 1923, amending General Laws, Chapter 90, Section 3, which provisions were complied with.

The defendant, appearing specially, filed an answer in abatement and a motion to dismiss. The motion to dismiss was denied and the answer in abatement overruled and the case reported to the Supreme Judicial Court for determination on the jurisdictional questions.

[fol. 28] The report was argued in the Supreme Judicial Court upon March 12th, 1924 and upon September 20th, 1924 an opinion was filed affirming the order denying the motion to dismiss and overruling answer in abatement.

The case was tried before a jury and upon April 3rd, 1925 a verdict was rendered in favor of the plaintiff in the sum of five hundred dollars ($500).

Upon September 27th, 1923 the automobile of the defendant with the defendant therein at the time, ran down the plaintiff on Millbury Street in the City of Worcester, Massachusetts, causing a fractured leg and other less serious injuries. At the time of the accident the plaintiff was between nine and ten years of age. The accident happened at about noon on a pleasant day. The plaintiff came home from school just before twelve o'clock and his mother gave him five cents with which to purchase a copy book, and the boy was going to cross the street to go to a store to buy this copy book when he was struck by the defendant's automobile.

George White, a witness called by the plaintiff testified as follows:

I live at 20 Seymour Street, Worcester, Massachusetts. At about 12:00 o'clock on September 27, 1923 I was walking along the left hand side of Millbury Street. I saw the plaintiff come out of an alley. He walked down the [fol. 29] sidewalk in front of me, a distance of about fifty feet, when he turned and stepped out into the street toward a store on the other side of the street. I saw the automobile of the defendant strike the plaintiff. The right front mudguard of the Packard car hit the plaintiff and threw him to the side of the car and to the street. The automobile was proceeding at about twenty to twenty-five miles per hour in the trolley car tracks, and did not change its direction or speed until after the accident happened. Lafayette Street intersects with Millbury Street at the point where the accident occurred but no horn on the defendant's automobile was blown or sounded approaching this intersection or at any time within the vicinity of where the accident happened. There is a curve in Millbury Street from the direction the automobile came, and although I was facing the car I did not see it until it was about ten yards from me and it was then nearer the plaintiff than it was to me. When the plaintiff left the sidewalk I saw no car in the street, and he had only taken four or five steps when he was struck.

Leo Pawloski, the plaintiff, testified as follows:

I went to school the day of the accident and came home about twelve o'clock. My mother gave me five cents to buy a copy book and I was going across the street to get it [fol. 30] when I was struck by the automobile. When I left the sidewalk I couldn't see any automobile. When I first saw the automobile it was so near me that I could not prevent getting hit. I do not know how the accident happened other than that the automobile hit me just after I left the sidewalk.

It was agreed by counsel that the automobile which struck the plaintiff was either being operated by the defendant or by someone for whose acts the defendant was responsible.

The defendant did not appear and no witnesses testified in his behalf.

The above is all the evidence material to the determination of this bill of exceptions.

At the close of the evidence the defendant filed a motion in writing for a directed verdict which was denied, and an exception saved to the defendant.

The defendant filed the following requests:

"Now comes the defendant, appearing specially, and not admitting but denying the jurisdiction of the court, files the following requests for rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. The attempted service of process on the defendant in this action is invalid under the Constitution of the United States, and particularly under Section 1 of Article [fol. 31] XIV of the Amendments thereto.

"3. The attempted service in this case if made the basis of a judgment amounts to depriving the defendant of his property without due process of law."

All three of these requests were denied and the defendant duly excepted.

The jury found a verdict for the plaintiff in the sum of five hundred dollars ($500) and the defendant, being ag-

grieved, now asks that this his bill of exceptions be allowed.

By His Attorneys, Choate, Hall & Stewart, Appearing Specially.

Allowance of this bill of exceptions assented to by H. J. Meleski, Atty. for the Plaintiff.

Order Settling Bill of Exceptions—July 23, 1925

Allowed: F. J. Macleod, J. S. C.

[fol. 32] In Supreme Judicial Court of Massachusetts

[Title omitted]

Pending in the Superior Court for the County of Worcester

Order Overruling Exceptions—Filed October 17, 1925

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court; viz: Exceptions overruled.

By the Court:

Walter F. Frederick, Clerk.

October 16, 1925.

Brief Statement of the Grounds and reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the Reporter of Decisions to which reference is made.

[File endorsement omitted.]

[fol. 33] In Superior Court of Worcestor County

[Title omitted]

Docket Entry of Judgment

In this action brought by writ dated November 9th, 1923, returnable to the Superior Court on the first Monday of

December, 1923, the following entry has been made on the docket: November 2, 1925. Judgment.

Witness my hand and the seal of said Court this thirtieth day of December, A. D. 1925.

Frank L. Dean, Clerk. (Seal the Superior Court.)

[fol. 34] In Superior Court of Worcester County

[Title omitted]

Docket Entries

Date	No.	
1923.	N.	
Dec. 3, 1923.	1	Dec. filed.
	2	Affidavit of compliance.
Dec. 15, 1923.	3	Ans. in abatement.
	4	Deft.'s mo. to dismiss.
Dec. 19, 1923.	5	Plff.'s cj.
Jan. 17, 1924.	..	Ans. in abatement overruled. Mo. to dismiss denied.
Jan. 31, 1924.	6	Report to S. J. C.
Feb. 7, 1924.	7	Certification for hearing at sitting of S. J. C. for Comlth.
Sept. 22, 1924.	8	Rescript received. viz: "Order denying motion to dismiss and overruling answer in abatement affirmed."
Oct. 2, 1924.	9	Answer.
Jan. 12, 1925.	10	Mo. to advance for speedy trial filed & alld.
Feb. 11, 1925.	11	Mo. to advance for speedy trial filed & alld.
Apr. 2, 1925.	12	Deft.'s mo. for directed verdict filed & denied.
Apr. 3, 1925.	13	Verdict for the plaintiff in the sum of $500.
Apr. 22, 1925.	14	Deft.'s bill of exceptions.
July 22, 1925.	..	Notice mailed under Rule 53.
July 25, 1925.	15	Deft.'s sub. bill of exceptions filed & alld.

Date	No.	
Oct. 17, 1925.	16	Rescript received, viz: "Exceptions overruled."
Nov. 2, 1925.	..	Judgment.
Dec. 18, 1925.	17	Pet. for Writ of Error from Supreme Court of U. S.
	18	Assignment of errors.
	19	Writ of Error to State Court.
	20	Citation on Writ of Error, with acceptance of service.
	21	Bond on Writ of Error, approved by Chief Justice Hall.
	22	Præcipe with proof of service.

[fol. 35] In Supreme Judicial Court of Massachusetts

[Title omitted]

Opinions and Judgment

Rugg, C. J.:

This is an action of tort wherein the plaintiff a resident of Worcester within this Commonwealth, seeks to recover compensation for personal injuries received by him while a traveller upon a public way in said Worcester by reason of the negligence or wanton misconduct of the defendant in driving a motor vehicle. The defendant is a resident of Pennsylvania. Service has been made upon the defendant by delivery of a precept in hand to the registrar of motor vehicles of this Commonwealth and by sending notice of such service to the defendant by registered mail, whose receipt therefor with affidavit of service is made a part of the record. There has been full compliance with the provisions of G. L. c. 90, as amended by St. 1923, c. 431, § 2, by the addition of two sections. The material part of those sections is in these words:

"Section 3A. The acceptance by a non-resident of the rights and privileges conferred by sections three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the Commonwealth other than under said sec-

tions, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his [fol. 36] office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

"Section 3B. The fee of two dollars paid by the plaintiff to the registrar at the time of the service shall be taxed in his costs if he prevails in the suit. The registrar shall keep a record of all such processes, which shall show the day and hours of service."

The single question for decision is whether jurisdiction has been acquired over the defendant. The constitutionality of the statute is assailed on the ground that it purports to subject to the judicial process of our courts a non-resident without personal service, and attempts to enlarge the jurisdiction of our courts beyond the territorial boundaries of the Commonwealth.

This statute is plainly enacted in the exercise of the police power. It is designed to afford protection to the personal safety of travellers on the highways of our Commonwealth. Its purpose is to promote the public safety and to conserve the public health. These ends are universally recognized as appropriate objects for the exercise of the police power. Specifically, the aim of the statute is to facilitate the enforce-

ment of civil remedies by those injured in their person or property by the negligent or wanton operation of motor vehicles upon the highways of this Commonwealth.

[fol. 37] It is to be noted that the statute here called in question is confined on the present record to causes of action which, although transitory in nature, occur in fact within this Commonwealth and which result from the act of the nonresident during his presence here and while using the facilities of travel afforded by the exercise of the soveign power of the Commonwealth, either directly or through its subordinate governmental agencies, in taking land for highways and in spending public money for their construction and maintenance. There is no constitutional mandate, so far as we are aware, which compels the government of this Commonwealth to provide highways for general public use. It is an appropriate governmental function to undertake such public works. Having constructed them, reasonable and uniform regulations may be enforced concerning their use. Legislation attempting to put nonresidents on the same general footing as our own citizens with respect to the use of such public facilities does not violate any constitutional guaranty. Hendrick v. Maryland, 235 U. S. 610. It is matter of common knowledge that this Commonwealth has expended many millions of dollars in the construction of new and the adaptation of old highways for convenient use by those travelling by motor vehicles. It is the duty as well as the right of the Commonwealth to adopt all practicable and reasonable measures to insure the safety and health of all travellers on highways, whether in motor vehicles or in other ways. "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public." Hendrick v. Maryland, 235 U. S. 610, 622. It is also matter of common knowledge that many lives are lost and large numbers of persons injured through the operation of motor vehicles on highways. Any rational legislation calculated to diminish this appalling impairment of human usefulness and [fol. 38] happiness is within the province of the legislative department of government. Commonwealth v. Pentz, 247 Mass. 500. The General Court well may have thought that one effective means for curbing negligence or wanton misconduct in the operation of motor vehicles would be the existence of swift, inexpensive and adequate remedy for in-

juries flowing therefrom. When one sustaining damage within this Commonwealth from the negligence or wanton misconduct of a nonresident is compelled to seek relief in the courts of a jurisdiction where personal service of process may be made upon him, "In many instances the cost of the remedy would" largely exceed "the value of its fruits. * * * The result would be, to a large extent, immunity from all legal responsibility" on the part of such nonresident. Railroad Co. v. Harris, 12 Wall. 65, 84. There is no necessary duration to the sojourn here of a nonresident operating a motor vehicle on our highways, such as commonly would accompany the transaction of business or the establishment of any mercantile or manufacturing enterprise. He might easily betake himself outside our boundaries in a very few hours, even from the most remote corner of the Commonwealth, and from most places in a considerable shorter time.

These considerations cannot override fundamental rights or warrant attempts at unauthorized extensions of jurisdiction. They merely serve to emphasize the well recognized presumption in favor of the constitutionality of every statute and the requirement generally fixed by courts for their guidance, that statutes will be refused enforcement only when their conflict with the Constitution is beyond reasonable doubt. They indicate that the Legislature in enacting the statute may have been attempting to remedy pressing evils of a practical nature. As was said in Hendrick v. Maryland, 235 U. S. 610, at page 624, with respect [fol. 39] to this special kind of statute, "The action of the State must be treated as correct unless the contrary is made to appear."

We are of opinion that the statutory requirement is valid, to the effect that the operation by a nonresident of a motor vehicle on the highways of this Commonwealth shall be deemed equivalent to an appointment by him of the registrar of motor vehicles for the time being as his agent to receive service of process in any action growing out of any accident or collision in which he may be involved during such operation. This seems to us to be established by Kane v. New Jersey, 242 U. S. 160. The statute there under consideration provided in substance that a nonresident owner of an automobile, before permitting it to be driven upon a public way, should file with a State officer a duly executed

instrument constituting such State officer his true and lawful attorney for the service of process in any action caused by the operation of his automobile within the State. In upholding the validity of that statute, after referring to the well recognized dangers to the public incidental to the operation of motor vehicles over highways, it was said at page 167:

"We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law."

It appears to us to be a difference immaterial in its constitutional aspects that the statute there under consideration required the execution of a formal power of attorney to [fol. 40] the State officer as an essential prerequisite to the use of the motor vehicle on the highway, while the statute here attacked provides that the actual voluntary driving of the motor vehicle on the highway shall be deemed to have the effect of a formal appointment of a designated public officer as agent of the driver. When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act commonly entails those consequences. That principle is most frequently applied in the enactment of statutes penalizing as criminal the performance of a designated act regardless of the motive which prompted it, or of knowledge or ignorance of legislative prohibition on the part of the one performing the act. The simple doing of the act, not evil in itself but merely prohibited by the Legislature brings about the statutory consequences of crime. Commonwealth v. Smith, 166 Mass. 370. Commonwealth v. Mixer, 207 Mass. 141. United States v. Balint, 258 U. S. 250, 252. Griffiths v. Studebakers, Ltd. [1924] 1 K. B. 102. That principle has been applied to the conduct of foreign corporations within

a jurisdiction other than that of their domicile. A State statute provided that, when a foreign corporation carried on business within its boundaries, it was subject to court process served on its agent within the State. In upholding the validity of such a statute, it was said in St. Clair v. Cox, 106 U. S. 350, 356:

"If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process."

This means that the appointment of the agent with authority to receive service of process will be implied even [fol. 41] though in fact the corporation may have issued an express contract of agency excluding such authority by definite words. Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147. That principle may not apply to an individual or partnership of nonresidents transacting business in a State other than that of their domicile. The underlying reason for that distinction has been said to be that the State has no power to exclude individual nonresident citizens of the United States while it in general has power to exclude foreign corporations. But at the same time it has been recognized that the implied consent to service in the case of foreign corporations rests upon a mere fiction. Pennsylvania Fire Ins Co. v. Gold Issue Mining & Milling Co. 243 U. S. 93, 96. Flexner v. Farson, 248 U. S. 289, 293. It may be wholly contrary to the fact. It is settled that police regulations of a reasonable nature respecting the use of its highways by nonresident operators of motor vehicles may be enacted by the several States. It is settled further that such regulations may go to the extent of utter prohibition unless and until licensed by the State. Kane v. New Jersey, 242 U. S. 160. The power to require a license imports extensive regulation. A statute attaching such an implication as appointment of an agent to receive service of process to the act of driving a motor vehicle on the highway is no more harsh in its operation upon the nonresident than a statute requiring the execution and filing

of a formal power of attorney. It seems to us that the implication required by the present statute is within the authority of Kane v. New Jersey, 242 U. S. 160, and Hendrick v. Maryland, 235 U. S. 610.

The case then stands upon the authority of the registrar of motor vehicles to receive service of the process implied by operation of the statute from the voluntary acceptance by the defendant of the benefits conferred upon him by the Commonwealth upon that condition.

[fol. 42] The defendant relies mainly upon the principle established by Pennoyer v. Neff, 95 U. S. 714, especially as stated at page 720 in these words:

"The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." Baker v. Baker, Eccles & Co. 242 U. S. 394. McDonald v. Mabee, 243 U. S. 90. Flexner v. Farson, 248 U. S. 289.

This court is, of course, strictly bound by these decisions. Our only concern is to follow the doctrine therein declared. These decisions seems to us wholly in harmony with our own earlier decision in Bissell v. Briggs, 9 Mass. 462, by which also we are bound. See, also, Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670. The case at bar rests upon the implied consent of the defendant arising from the facts already stated. That principle as a basis of jurisdiction is recognized in Pennoyer v. Neff, 95 U. S. at page 735. For the reasons already stated, we think the main doctrine of Pennoyer v. Neff and the other cases just cited is inapplicable to the case at bar. The defendant in substance and effect, by operating a motor vehicle on our highways, by implication of the statute appointed the registrar of motor vehicles his agent to receive service of process in a case like the present.

No question has been raised in the case at bar as to the sufficiency of the service upon the defendant if he can be held at all. See Roller v. Holly, 176 U. S. 398. Pennoyer v. Neff, 95 U. S. 714, 735.

Order denying motion to dismiss and overruling answer in abatement affirmed.

[fol. 42a] Reporter's certificate to foregoing paper omitted in printing.

[fol. 43] [Title omitted]

RUGG, C. J.:

This is an action of tort brought to recover compensation for personal injuries received by the plaintiff through being struck by an automobile owned by the defendant and operated by him or by someone for whose acts he was responsible. The injury occurred at the intersection of two streets in Worcester at about noon of a pleasant September day. At that time the plaintiff was between nine and ten years of age and was on his way to a store to make a purchase. He testified: "When I left the sidewalk I couldn't see any automobile. When I first saw the automobile it was so near me that I could not prevent getting hit. I do not know how the accident happened other than that the automobile hit me just after I left the sidewalk." An eyewitness testified that the plaintiff was walking about fifty feet in front of him on the sidewalk when the plaintiff stepped out into the street toward a store; that the speed or direction of the automobile, "proceeding at about twenty to twenty-five miles per hour in the trolley car tracks," was not changed until after it hit the plaintiff; that no horn on the automobile was sounded as it approached the intersection of the streets or at any time in the vicinity; that there was a curve in the street from the direction from which "the automobile came, and although I was facing the car I did not see it until it was about ten yards from me and it was then nearer the plaintiff than it was to me. When the plaintiff left the sidewalk I saw no car in the street, and he had only taken four or five steps when he was struck." This was all the evidence. No testimony was introduced by or in behalf of the defendant.

A finding was warranted that the plaintiff was in the exercise of due care. Tripp v. Taft, 219 Mass. 81. Beale [fol. 43a] v. Old Colony Street Railway, 196 Mass. 119. Kaminski v. Fournier, 235 Mass. 51. Rasmussen v. Whipple, 211 Mass 546. Bengle v. Cooney, 243 Mass. 10.

There was evidence of negligence, causative of the injury, on the part of the one in control of the automobile. Its speed and the failure to sound its horn may have been found to be violative of G. L. c. 90, §§ 14, 17, in particulars conducive to the injury, and hence evidence of negligence on that account, as well as intrinsically careless. Creedon v. Galvin, 226 Mass. 140. Emery v. Miller, 231 Mass. 243. Powers v. Loring, 231 Mass. 458. Coope v. Scannell, 238 Mass. 288. Davicki v. Flanagan, 250 Mass. 379, 381.

The defendant's motion for a directed verdict and his request for a ruling that the plaintiff was not entitled to recover were denied rightly.

The plaintiff brought his action against a nonresident defendant without making personal service but by complying with the provisions of St. 1923, c. 431, § 2, as to service. That section is quoted in full in a previous decision in this case, 250 Mass. 22, where its constitutionality was discussed at large and upheld against all objections so far as we have jurisdiction to pass upon those questions. The reasons for that conclusion are there stated at length and need not be repeated. We adhere to and affirm them. It follows that in our opinion the defendant's requests for instructions numbered 2 and 3, to the effect that the service of process infringed his rights secured by § 1 of the Fourteenth Amendment to the Constitution of the United States, were denied rightly.

Exceptions overruled.

[fol. 43b] Reporter's certificate to foregoing paper omitted in printing.

[fol. 44] In Superior Court of Worcester County

[Title omitted]

Præcipe for Transcript of Record—Filed December 18, 1925

To the Clerk of the Superior Court of the Commonwealth of Massachusetts within and for the County of Worcester aforesaid:

Please incorporate into the transcript of the record to accompany your return to the writ of error:

1. Writ and Sheriff's return.
2. Declaration, including Affidavit of Compliance with return receipt appended thereto.
3. Answer in Abatement.
4. Motion to dismiss.
5. Order overruling answer in abatement and denying motion to dismiss.
6. Report of Weed, J. to the Full Court.
7. Rescript.

[fol. 45] 8. Verdict.

9. Substitute bill of exceptions.
10. Rescript.
11. Final judgment.
12. Copy of docket in above proceedings.
13. Copy of petition for writ of error.
14. Copy of assignments of error.
15. Copy of bond.
16. Citation and proocedings thereon.
17. Copy of opinion of Full Bench on order of Weed, J. overruling the answer in abatement and denying the motion to dismiss reported by Weed, J.
18. Copy of opinion of Full Bench on bill of exceptions.

Counsel for the plaintiff in error deems the above portions of the record and other documents to be material to and necessary for a decision of the questions involved.

Respectfully, Choate, Hall & Stewart.

[fol. 46] I, Joseph Wentworth, of Choate, Hall & Stewart, of Counsel for the plaintiff in error in the above entitled proceedings hereby certify, declare and state that I have served a copy of the foregoing præcipe on the defendant in error by sending on December 17, 1925, a copy thereof by registered mail, postage prepaid, addressed to Harry J. Meleski, his attorney, at his usual place of business, 1011 Park Building, Worcester, Massachusetts.

Joseph Wentworth.

COMMONWEALTH OF MASS.,
County of Suffolk, ss:

December 17, 1925.

Subscribed and sworn to this 17th day of December, 1925. Before me,

Robert Proctor, Notary Public. My commission expires February 4, 1932. (Seal.)

[File endorsement omitted.]

[fol. 47] Judge's certificate to clerk omitted in printing.

[fols. 48 & 49] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 50] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF THE RECORD TO BE PRINTED, WITH PROOF OF SERVICE—Filed January 23, 1926

To the Clerk of the Supreme Court of the United States:

Please have printed the entire record forwarded to you in the above case by the Clerk of the Superior Court of the Commonwealth of Massachusetts for Worcester County.

The plaintiff in error will rely upon all the errors assigned in its Assignment of Errors heretofore filed.

Respectfully, John L. Hall, Attorney for Plaintiff in Error.

I, John L. Hall, counsel for the plaintiff in error in the above entitled proceedings hereby certify, declare and state that I have served a copy of the foregoing statement of points to be relied upon and of parts of the record to be printed on the defendant in error by sending on January 22, 1926 a copy thereof by registered mail, postage prepaid and addressed to Harry J. Meleski, his attorney, whose usual place of business is 1011 Park Building, Worcester, [fol. 51 & 52] Massachusetts.

John L. Hall.

COMMONWEALTH OF MASS.,
County of Suffolk, ss:

January 22, 1926.

Subscribed and sworn to this 22nd day of January, 1926. Before me:

Robert Proctor, Notary Public. My commission expires Feb. 4, 1932. (Seal of Robert Proctor, Notary Public. Commonwealth of Massachusetts. My commission expires Feb. 4, 1932.)

[File endorsement omitted.]

Endorsed on cover: File No. 31,599. Massachusetts Superior Court of Worcester County. Term No. 876. H. W. Hess, plaintiff in error, vs. Leo Pawloski, minor, proceeding by his father and next friend, Stanislaw Pawloski. Filed January 9th, 1926. File No. 31,599.

No. 263

OCTOBER TERM, 1926.

IN THE

Supreme Court of the United States

H. W. HESS, Plaintiff in error,

vs.

LEO PAWLOSKI, Minor, proceeding by his father and next friend, STANISLAW PAWLOSKI.

IN ERROR TO THE SUPERIOR COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE GOWEN PARRY,
Of Counsel.

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Counsel for Plaintiff in error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

APPENDIX.

CASES CITED.

OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW.

250 Mass. 22.
253 Mass. 478.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. DATE OF JUDGMENT.

The judgment was entered November 2, 1925 (R. 16).

2. CLAIMS ADVANCED AND RULINGS MADE BELOW.

The defendant, plaintiff in error, appearing specially and solely for the purpose of challenging the jurisdiction filed an answer in abatement in the Superior Court of Worcester County, Massachusetts, on the ground that process in this action had not been properly or lawfully served upon him; that the attempted service upon him was invalid under the Constitution of the United States and the amendments thereto and was in conflict with, and in violation of, the provisions of the said Constitution and the said amendments, especially in that said attempted service, if sustained and if made the basis of a judgment, would amount to depriving him of his property without due process of law (R. 9). A motion to dismiss the action for want of jurisdiction was filed December 15, 1923 (R. 10). The motion was denied and the answer in abatement overruled on January 17, 1924. This order was reported to the Supreme Judicial Court of Massachusetts, which on September 20, 1924, filed its opinion (R. 18) affirming the order denying the motion to dismiss and overruling the answer in abatement.

At the trial the defendant, plaintiff in error, appearing specially and denying the jurisdiction of the court, requested certain rulings (R. 15), to wit: that the attempted service on the defendant in this action was invalid under the Constitution of the United States and that if made the basis of a judgment would amount to depriving the defendant of his property without due process of law. These requests were denied (R. 15). The defendant duly excepted, the exceptions were allowed (R. 16), and on October 17, 1925, the exceptions were overruled (R. 18) by the Supreme Judicial Court which filed an opinion (R. 25).

3. JURISDICTION.

The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, 43 Statutes at Large 937, amending Section 237 of the Judicial Code; Code of General Laws, Title 28, Section 344, page 906; which provides, inter alia:—

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, statutes or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

STATEMENT OF THE CASE.

This case comes before the Court on a writ of error to the Superior Court of Worcester County, Massachusetts, to review a judgment of that Court entered upon a verdict for the plaintiff, defendant in error, in the sum of $500.

The action was in tort, brought by Leo Pawloski, p.p.a., a resident of Worcester, Massachusetts, against H. W. Hess, a resident of Philadelphia, Pennsylvania, to recover damages for personal injuries sustained by him on September 27, 1923, through the alleged negligent operation by Hess of an automobile in the City of Worcester, Massachusetts.

The plaintiff below in bringing his action complied with the provisions of Chapter 431, §2 of the Massachusetts Acts of 1923 which provides, inter alia, that:—

> "the operation by a non-resident of a motor vehicle on a public way in the Commonwealth * * * shall be deemed equivalent to an appointment by such non-resident of the registrar, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way."

The Act further provides that service of such process shall be made by leaving a copy of the writ at the Registry of Motor Vehicles and this shall be a sufficient service upon the non-resident, provided that notice of the service and a copy of the writ be sent to the defendant by registered mail and a copy of the return receipt and an affidavit of compliance with the statute, appended to the writ and filed with the declaration (R. 18, 19).

Counsel for the defendant below, plaintiff in error, appearing specially and solely for the purpose of contesting jurisdiction, on December 15, 1923, filed an answer in abatement (R. 9) on the ground that process had not been properly or lawfully served upon the defendant; that the attempted service was invalid under the Constitution of the United States and particularly under Section 1, Article XIV of the Amendments thereto. A motion to dismiss (R. 10) was filed the same day and in support of the motion it was urged that it appeared from the record that

the defendant, plaintiff in error, was a resident of Philadelphia in the State of Pennsylvania; that no personal service had been made upon him and that no property belonging to him within the State of Massachusetts had been attached; that the attempted service of process was invalid as repugnant to the Constitution of the United States and the Fourteenth Amendment thereto, especially in that said attempted service if sustained and made the basis of a judgment would amount to depriving the defendant of his property without due process of law.

The learned Judge of the Superior Court after hearing argument, entered an order denying the motion to dismiss and overruling the answer in abatement, but being of the opinion that, before any further proceedings were had, the correctness of this order ought to be determined by the full court, he reported the case for that purpose (R. 11).

The Supreme Judicial Court in an opinion by Rugg, *C. J.* (R. 18), affirmed the order and the case proceeded to trial. The defendant's counsel appearing specially at the trial made the following requests for rulings (R. 15):—

> "2. The attempted service of process on the defendant in this action is invalid under the Constitution of the United States, and particularly under Section 1 of Article XIV of the Amendments thereto.
>
> "3. The attempted service in this case if made the basis of a judgment amounts to depriving the defendant of his property without due process of law."

These requests were denied, exceptions were taken, the jury found a verdict for the plaintiff in the sum of $500 and a bill of exceptions was allowed (R. 15).

The exceptions were argued before the Supreme Judicial Court which overruled them in an opinion by Rugg, *C. J.* (R. 25), whereupon the Superior Court of Worcester County entered judgment for the plaintiff below, defendant in error.

A writ of error was allowed by the Chief Justice of the Superior Court on December 18, 1925 (R. 2).

SPECIFICATIONS OF ERROR.

1. The learned Court below erred in denying the defendant's motion to dismiss the action, said motion having been made on the ground that the court had acquired no jurisdiction over the defendant, plaintiff in error, and that the attempted service of process on the said defendant, plaintiff in error, made in compliance with the provisions of Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section 2 of Ch. 431, Acts of 1923, was invalid under and in contravention of the Constitution of the United States, and particularly Section 1 of Article 14 of the Amendments thereto.

2. The learned Court below erred in overruling the defendant's answer in abatement, said answer in abatement having been made on the ground that the court had acquired no jurisdiction over the defendant, plaintiff in error, and that the attempted service of process on the said defendant, plaintiff in error, made in compliance with the provisions of Section 3 of Ch. 90, General Laws of Massachusetts as amended by Section 2 of Ch. 431, Acts of 1923, was invalid under and in contravention of the Constitution of the United States, and particularly Section 1 of Article 14 of the Amendments thereto.

3. The learned Court below erred in denying at the trial the second request for ruling filed by the defendant, plaintiff in error, as follows:—

> "2. The attempted service of process on the defendant in this action is invalid under the Constitution of the United States, and particularly under Section 1 of Article 14 of the amendments thereto."

4. The learned Court below erred in denying at the trial the third request for ruling filed by the defendant, plaintiff in error, as follows:—

"3. The attempted service in this case, if made the basis of a judgment, amounts to depriving the defendant of his property without due process of law."

5. The learned Court below erred in holding that Section 3 of Ch. 90, General Laws of Massachusetts, as amended by Section 2 of Ch. 431, Acts of 1923, was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States as depriving persons or this defendant, plaintiff in error, of property without due process of law when service made in compliance with the said sections was made the basis of a judgment by that court.

6. The learned Court below erred in holding that the said sections did not constitute a denial to the citizens of other States and to this defendant of privileges and immunities of the citizens of the Commonwealth of Massachusetts in contravention of Article 4, Section 2 of the Constitution of the United States.

Summary of Argument.

I. A personal judgment against a defendant, over whom the Court rendering it has no jurisdiction is invalid.

A court cannot pronounce a judgment in personam against a defendant over whom it has no physical power.

Such a judgment under the Fourteenth Amendment is a nullity even in the State where it is rendered.

A statute which provides that a non-resident who causes damage by the operation of a motor vehicle within the state, shall be deemed to have appointed a state official as his agent upon whom service of process may be made, is repugnant to the Fourteenth Amendment.

The theory of implied consent to service, relied upon as a convenient fiction in the case of foreign corporations, has been conclusively determined to be inapplicable to individuals.

II. THE SERVICE OF PROCESS MADE UPON THE REGISTRAR OF MOTOR VEHICLES GAVE THE COURTS OF MASSACHUSETTS NO JURISDICTION WHATEVER OVER THE DEFENDANT, PLAINTIFF IN ERROR, THE STATUTE AUTHORIZING IT BEING IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES AND THE AMENDMENTS THERETO.

Jurisdiction to render a judgment in personam can be acquired only by personal service in the State, express consent, or by constructive or substituted service upon one domiciled within the State.

The impossibility of securing jurisdiction over non-residents by other means has been repeatedly declared by this Court.

A state may require a non-resident motorist to submit to the jurisdiction of its courts upon substituted service, as a condition precedent to issuing him a license; but it cannot acquire jurisdiction over him, without his consent, after he has left the state, by extraterritorial or substituted service.

A state may not impose an unconstitutional condition upon its consent to the performance of an act which it has a right to forbid. Otherwise it might accomplish by indirection, that which it may not do directly.

ARGUMENT.

This is an action of tort brought by Leo Pawloski, p.p.a., a resident of Worcester, Massachusetts, against H. W. Hess, the defendant below, plaintiff in error, a resident of Philadelphia, Pennsylvania, on account of an automobile accident happening in Worcester on September 27, 1923. The plaintiff below in bringing this action complied with Chapter 431, Section 2, Acts 1923 amending General Laws of Massachusetts, Chapter 90, Section 3, which provided, *inter alia*, that:—

> "The operation by a non resident of a motor vehicle on a public way in the Commonwealth * * * shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his attorney upon whom may be served all lawful process in any action or proceeding against him growing out of any accident or collision in which said non resident may be involved while operating a motor vehicle on such a way."

This Statute is printed in full in an appendix to this Brief (p. 29) and pertinent portions of it are quoted in the opinion of the Supreme Judicial Court of Massachusetts (R. 18).

The sheriff's return of service is as follows (R. 6):—

> "SUFFOLK, ss.
>
> BOSTON, November 14th, 1923.
>
> By virtue of this Writ, I this day attached a chip as the property of the within named defendant, H. W. Hess, and afterwards on the same day I summoned said defendant to appear and answer at Court as within directed by delivering into Frank A. Goodwin, Esq., Registrar of Motor Vehicles for the Commonwealth of Massachusetts, his agent, a summons of this writ, together with two dollars paid to the Registrar."

It will be noted that no personal service of process was made upon the defendant within the Commonwealth of Massachusetts nor was any property owned by him attached in Massachusetts.

It is perfectly clear from the terms of the Statute that the defendant by coming into the Commonwealth of Massachusetts, is deemed to consent to the jurisdiction of its courts. The theory underlying this statutory provision is that of implied consent to the State Court's jurisdiction. This is the view taken by the Supreme Judicial Court of Massachusetts which says in its opinion (R. 24):—

> "The case at bar rests upon the implied consent of the defendant arising from the facts already stated. * * * The defendant in substance and effect by operating a motor vehicle on our highways, by implication of the Statute appointed the Registrar of Motor Vehicles his agent to receive service of process in a case like the present."

It is the contention of the plaintiff in error that such an implication has no place in our law and that its affirmance would do violence to the Constitution of the United States and the body of decisional authority supporting it.

I. A PERSONAL JUDGMENT AGAINST A DEFENDANT, OVER WHOM THE COURT RENDERING IT HAS NO JURISDICTION, IS INVALID.

In the leading case of **Pennoyer vs. Neff,** 95 U. S. 714 (1877), this court expressed in unambiguous terms principles which are the foundation of jurisdiction. Mr. Justice Field said:—

P. 720:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assertion of power and be resisted as mere abuse."

P. 730:

> "The international law as it existed among the states in 1790 was that a judgment rendered in one state assuming to bind the person of a citizen of another was void within the foreign state when the

defendant had not been served with process or voluntarily made defense because neither the legislative jurisdiction nor that of the courts of justice had binding force."

P. 733:

"Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned and their enforcement in the state resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—to pass upon the subject matter of the suit; and, if, that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

This principle has been stated time and again in this court.

In **Goldey vs. Morning News,** 156 U. S. 518 (1895), it is said:—

"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service on his behalf."

In **Hall vs. Lanning,** 91 U. S. 160 (1875), it was ruled that:—

> "A member of a partnership residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although all the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought authorized such judgment."

To the same effect are D'Arcy *vs.* Ketchum, 11 How. 165; Hart *vs.* Sansom, 110 U. S. 151; Arndt *vs.* Griggs, 134 U. S. 316; Freeman *vs.* Alderson, 119 U. S. 185; Grover *vs.* Radcliffe, 137 U. S. 287; N. Y. Life Ins. Co. *vs.* Dunlevy, 241 U. S. 518; Flexner *vs.* Farson, 248 U. S. 289.

In **Baker vs. Baker, Eccles & Co.,** 242 U. S. 394 (1917), Mr. Justice Pitney said, at page 403:—

> "It is difficult to see how such a judgment could legitimately have force even within the state. But until the adoption of the Fourteenth Amendment (1868) this remained a question of state law; the effect of the 'due process' clause of that Amendment being to establish it as the law for all the states that a judgment rendered against a non resident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the state whose court had rendered it and to make the assertion of its invalidity a matter of federal right.
>
> "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. Louisville and Nashville R. R. Co. *vs.* Schmidt, 177 U. S. 230, 236; Simon *vs.* Craft, 182 U. S. 427, 436; Grannis *vs.* Ordean, 234 U. S. 385, 394. To hold one bond by the judgment who has not had such opportunity is contrary to the first principles of justice.

> And to assume that a party resident beyond the confines of a State is required to go within its borders and submit his personal controversy to its tribunal upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory."

It is immaterial, therefore, whether or not the defendant had notice of the action and an opportunity to be heard, for actual service upon a non resident defendant outside the jurisdiction is insufficient.

Harkness vs. Hyde, 98 U. S. 476 (1887);
Wilson vs. Seligman, 144 U. S. 41 (1892).

The judgment is valid only when the State has some power or control over the defendant and the Commonwealth of Massachusetts did not acquire such control by the service of process in Pennsylvania as to base a valid judgment in personam against the defendant.

It was held in **McDonald vs. Mabee,** 243 U. S. 90 (1917), that the "foundation of jurisdiction is physical power," and it follows that the courts of a state cannot be given authority by a statute to impose liabilities upon persons over whom the state has no control. But the Supreme Judicial Court of Massachusetts does not expressly dissent from these principles of jurisdiction. Citing Pennoyer *vs.* Neff, and Baker *vs.* Baker Eccles & Co., *supra,* it continues (R. 24):—

> "This court is, of course, strictly bound by these decisions. Our only concern is to follow the doctrine therein declared. These decisions seem to us wholly in harmony with our own earlier decision in Bissel *vs.* Briggs, 9 Mass. 462, by which also we are bound. * * * The case at bar rests on the implied consent of the defendant arising from the facts already stated. * * * The defendant in substance and effect, by operating a motor vehicle on our highways,

> by implication of the Statute appointed the Registrar of Motor Vehicles his agent to receive service of process in a case like the present."

Since the decision of this Court in **Flexner vs. Farson,** 248 U. S. 289, the analogy of suits against foreign corporations based upon constructive service may no longer be invoked but as the learned Court below bases its reasoning upon these cases they deserve examination.

From the first pronouncement of the theory of implied consent in 1856, in **Lafayette Insurance Co. vs. French,** 18 How. 404, it is manifest that this Court never looked upon it as more than a legal fiction which achieved substantial justice. In that case the language employed is, "Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them." Later cases are more outspoken in their characterization of this doctrine. **Chipman, Ltd. vs. Jeffery Co.,** 251 U. S. 373 (1920), quotes with approval the doctrine of the New York cases, that "The essential thing is that the corporation shall have come into the state." In **Flexner vs. Farson,** 248 U. S. 289 (1919), with reference to such cases as that of **Lafayette Insurance Co. vs. French,** *supra,* it was said:—

> "But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the State could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in."

And the language of Learned Hand, *J.,* in **Smolik vs. Phila. & Reading Coal & Iron Co.,** 222 Fed. 148, 151, to the effect that:—

> "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent

> to receive service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court for purposes of justice, treats it as if it had,"

was expressly approved by this Court in **Pennsylvania Fire Insurance Co. vs. Gold Issue Mining & Milling Co.,** 243 U. S. 93, 96 (1917), in which it was said that:—

> "Of course, as stated by Learned Hand, *J.*, in 222 Fed. 148, 151, this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. Lafayette Insurance Co. *vs.* French, 18 How. 404; Michigan Trust Co. *vs.* Ferry, 228 U. S. 346, 353."

That the true basis of jurisdiction in such cases is the presence of the corporation, through its agents and so far as it is carrying on business within the state, is strongly suggested in the quoted portion of the opinion in **Chipman, Ltd. vs. Jeffery Co.,** *supra,* but is developed more definitely in the following cases. In **International Harvester Co. vs. Kentucky,** 234 U. S. 579 (1914), the defendant was held amenable to process because it was doing business within Kentucky, although it was entirely in the nature of interstate commerce, so that the State could not have prevented the corporation from carrying it on. In **Phila. & Reading Rwy. Co. vs. McKibben,** 243 U. S. 264 (1917), this Court expressed itself emphatically and unmistakably as to ground of jurisdiction in such cases in the following language, "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." And in **Rosenberg Bros. & Co. vs. Curtis**

Brown Co., 260 U. S. 516 (1923), in holding the evidence as to transaction of business insufficient, this Court said, "Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State." To the same general effect is the language employed in **St. Louis Southwestern Rwy. Co. of Texas vs. Alexander,** 227 U. S. 218 (1913).

From all this it seems clear that the doctrine of implied consent to jurisdiction, advanced as a convenient fiction, is subject to some limitation. The consent may not be implied where the corporation is not doing business within the state; **Wayne Mutual Life Ins. Co. vs. McDonough,** 204 U. S. 8 (1915), and if it is not so doing business it is not brought within the state by the presence of its agents. **Chipman vs. Jeffery Co.,** 251 U. S. 373 (1920). Nor may statutory requirements as to constructive agency in default of an actual appointment extend to causes of action arising in other states. **Simon vs. Southern Rwy.,** 236 U. S. 115 (1915).

The Court below draws from these cases the doctrine of implied consent to service. In accordance with the decisions of this Court it holds that the doctrine may not apply to the non-resident individual transacting business in a state not his domicile, and gives as the underlying reason for the distinction that the state has no power to exclude the non-resident individual while generally speaking it has the power to exclude the foreign corporation. This is clear enough. But when the Court proceeds (R. 23) from this to the proposition that, because in the case of a foreign corporation the implied consent rests upon a mere fiction which may be wholly contrary to fact, that fiction may be implied by Statute in the case of an individual non-resident automobilist, the argument is hard to follow. Upon analysis indeed, it would seem that the relation between the two cases is made to depend on the determination of the question, whether the implied consent is or is not contrary to the fact.

II. THE SERVICE OF PROCESS MADE UPON THE REGISTRAR OF MOTOR VEHICLES GAVE THE COURTS OF MASSACHUSETTS NO JURISDICTION WHATEVER OVER THE DEFENDANT, PLAINTIFF IN ERROR; THE STATUTE AUTHORIZING IT BEING IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES AND THE AMENDMENTS THERETO.

It is well recognized that there are three situations in which a state has been able to assert jurisdiction so as to support a valid judgment in personam:—

1. When the defendant is present within the state, he may be personally served with process.
2. When there is an expressed consent to the acquisition of jurisdiction, as when the defendant appoints an agent, enters a general appearance or stipulates to waive service.
3. Based on the control a sovereignty possesses over all persons domiciled within its borders and the allegiance they owe to its laws, State Statutes providing for constructive or substituted service have been held constitutional.

These are the situations in which a state acquires such control over an individual as to subject him to the jurisdiction of its courts. A fourth means, that attempted by the Statute here under consideration, has been declared unconstitutional by this Court in **Flexner vs. Farson,** 248 U. S. 289 (1919).

The Statute of Kentucky which attempted to give to the courts of that State jurisdiction over non-resident defendants, provided that:—

> "In actions against an individual residing in another State, or a partnership association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the County where the business is carried on, or in the County where the cause of action accrued."

That statute, like the Massachusetts statute here involved, implied a consent on the part of the defendants to be bound by the service prescribed. In Kentucky, that implication was said to arise from the act of the defendants of doing business in the State. By the terms of the Massachusetts statute a non-resident who operates a motor vehicle over the highways of this Commonwealth is deemed in like manner to consent to the jurisdiction of our courts. That this doctrine of implied consent to service of process as founding a court's jurisdiction over non-resident individuals can no longer be advanced, will be seen from a study of the opinion of the court, where Mr. Justice Holmes, at page 293, says:—

> "* * * the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. Mutual Reserve Fund Life Association *vs.* Phelps, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. Lafayette Ins. Co. *vs.* French, 18 How. 404. Pennsylvania Fire Ins. Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S. 93, 96. The State has no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. New York Life Ins. Co. *vs.* Dunlevy, 241 U. S. 518, 522, 523."

The ratio decidendi of this opinion is obvious: A State may not by statute confer upon its courts jurisdiction over non-residents not personally present within the State and not expressly consenting to the jurisdiction of the courts of the State, even though engaged in business within the State. It follows, therefore, as an a fortiori case, where an individual is not engaged in business within the State, but merely passing through the State in a motor vehicle, that its courts cannot acquire jurisdiction where there is no express consent to such jurisdiction by the non-resident, unless he is personally served within the borders of the State.

The opinion in Flexner *vs.* Farson is broad in its terms. "Without going further," the Court declared the attempted service as prescribed by the Kentucky statute invalid, since its effect would have been to exclude private individuals from the State and thus violate Article IV, Section 2 of the Federal Constitution. It should be noted that the Supreme Court of Illinois, whose judgment was affirmed on writ of error to the United States Supreme Court, placed its decision on the alternate ground of violation of the due process clause in the Fourteenth Amendment. (268 Ill. 435.) And in **Moredock vs. Kirby,** 118 Fed. 180 (1902), where the validity of the Kentucky Statute again arose for determination, the Circuit Court for the Western District of Kentucky rested its reasoning on the same alternate grounds. So also the Supreme Court of Minnesota in **Cabanne vs. Graf,** 87 Minn. 510 (1902).

Similar Statutes were held invalid in **Brooks vs. Dun,** 51 Fed. 138 (1892) and **Ralya Market Co. vs. Armour & Co.,** 102 Fed. 530 (1900), which review the authorities.

The reasoning of Mr. Justice Holmes in Flexner *vs.* Farson suggests the necessity of drawing a line of demarcation between those cases which involve jurisdiction over non-resident individuals or partnerships and those which involve jurisdiction over foreign corporations. Article IV, Section 2 of the Federal Constitution does not

apply to foreign corporations; a corporation is not a "citizen." **Paul vs. Virginia,** Wall. 168 (1869). Although service of process may be made on a foreign corporation which has not expressly consented to the jurisdiction, the consent to jurisdiction may be, according to the language of the courts, "implied," and this implication is only justified on the accepted doctrine that the State could exclude the corporation altogether and, therefore, could establish this obligation as a condition to letting it in. But as the State has no power to exclude an individual the analogy fails.

But the Supreme Judicial Court of Massachusetts argues from this analogy and while it concedes that reasons of inconvenience cannot override fundamental rights, it holds that they serve to emphasize the presumption in favor of the constitutionality of every statute and the requirement that statutes will be refused enforcement only when they conflict with the Constitution beyond a reasonable doubt (R. 21). It relies on two decisions of this Court; Hendrick *vs.* Maryland and Kane *vs.* New Jersey.

In **Hendrick vs. Maryland,** 235 U. S. 610 (1915), the constitutionality of a Statute of the State of Maryland was in question which provided that before any motor vehicle was operated upon its highways the owner must procure a certificate of registration and obtain a license tag which, borne upon the machine, should be evidence of authority for operating it. That no person should drive such vehicle until he obtained an operator's license and that any non-resident who had complied with the laws of his own state on the subject might, under specified conditions, obtain a distinguishing tag and permission to operate his car for a certain time without paying the ordinary fees.

Hendrick was arrested in Maryland while operating his automobile without having complied with the provisions of the Act and was found guilty of the charge and fined. It was held that the Act was a valid exercise of the police power, that it did not constitute a direct and material burden on interstate commerce, that the action of the State must be treated as correct unless the contrary was made to

appear and that as there was no evidence concerning the value of the facilities provided by the State, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed, it could not be said that from a mere inspection of the Statute its provisions were abitrary or unreasonable.

In **Kane vs. New Jersey,** 242 U. S. 160 (1916), there was an additional statutory requirement imposed upon a non-resident automobilist desiring to use the state highways. He was not only obliged to register his car and take out a driver's license, but he was required to file with the Secretary of State a letter of attorney constituting him, and his successors in office, the non-resident's agent upon whom process might be served in any action arising out of the operation of his registered motor vehicle within the State, and therein agree that any original process so served be of the same force and effect as if served upon the non-resident within the State. Penalties were prescribed for a violation of these requirements. The Act also differed from that of Maryland in that it contained no reciprocal provision by which a non-resident was given free use of the highways in return for similar privileges granted by the State of the non-resident's domicile.

Kane, a resident of New York, had registered his car there but not in New Jersey. He had a driver's license from both states but had not filed the prescribed instrument with the New Jersey official. He was arrested in New Jersey, while driving from New York to Pennsylvania, was charged with a violation of the Statute and was convicted and fined. He contended that the Statute was invalid as to him because it violated the Commerce Clause of, and the Fourteenth Amendment to, the Constitution of the United States. Referring to Hendrick *vs.* Maryland, this Court held that it could not say that the Legislature of New Jersey was unreasonable in believing that ability to establish by legal proceedings within the State, any financial liability of non-resident owners, was essential to public safety. That absence of a reciprocal provision (since

adopted by New Jersey) was not an essential of valid regulation and absence of it did not involve discrimination, for any resident wishing to use the highway for a single day must pay the same fee.

Now the pertinent question before the Court was simply whether or not the State had the power to forbid a non-resident to operate a motor vehicle over its highways without having filed an express consent to service of process upon a designated agent and to arrest and fine him when found within the State for his failure to do so. It was held that the State had the power, but the question did not arise whether the State, in the absence of such express consent, could exercise jurisdiction over a defendant after he had left the State.

That is the question now before this Court. From the right of the State, under its police power, to impose as a condition precedent to a non-resident's operation of a motor vehicle in Massachusetts, the requirement that he file an express consent to service of process, the conclusion is reached by the courts below that where there is no consent, voluntary or forced, to a valid service of process, jurisdiction may be acquired over a non-resident who is not served within the State, so as to enable the Court to render and enforce a judgment in conformity with the due process clause and Section 2 of Article IV of the Federal Constitution.

Referring to the New Jersey Statute under consideration in Kane *vs.* New Jersey, *supra*, the Supreme Judicial Court of Massachusetts said (R. 22):—

> "It appears to us to be a difference immaterial in its constitutional aspects that the statute there under consideration required the execution of a formal power of attorney to the State officer as an essential prerequisite to the use of the motor vehicle on the highway, while the statute here attacked provides that the actual voluntary driving of the motor vehicle on the highway shall be deemed to have the effect of a formal appoint-

ment of a designated public officer, as agent of the driver. When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act commonly entails those consequences. That principle is most frequently applied in the enactment of statutes penalizing as criminal the performance of a designated act regardless of the motive which prompted it, or knowledge of legislative prohibition on the part of the one performing the act. The simple doing of the act, not evil in itself but merely prohibited by the Legislature, brings about the statutory consequences of crime.

"It is settled that police regulation of a reasonable nature respecting the use of its highways by non-resident operators of motor vehicles may be enacted by the several states. It is settled further that such regulations may go to the extent of utter prohibition unless and until licensed by the State, Kane *vs.* New Jersey, 242 U. S. 160. The power to require a license imports extensive regulation. A statute attaching such an implication as appointment of an agent to receive service of process to the act of driving a motor vehicle on the highway is no more harsh in its operation upon the non-resident than a statute requiring the execution and filing of a formal power of attorney. It seems to us that the implication required by the present statute is within the authority of Kane *vs.* New Jersey, 242 U. S. 160, and Hendrick *vs.* Maryland, 235 U. S. 610."

Now while questions of jurisdiction may concern themselves with reasonableness, that is not the basis of jurisdiction. One of the fundamental requisites of "due process of law" is the opportunity to be heard and so we presume that if this Statute had made no provision for notice to an absent defendant, it would have been so harsh as to be unreasonable. But a comparison of this with the New Jersey Statute in respect to harshness does not help the question.

As a matter of fact there appears to be a great practical difference between them. In New Jersey the defendant is actually aware that he submits himself to the jurisdiction of the State by his conscious act of filing the Power of Attorney, whereas under the Massachusetts law he is almost certainly ignorant that driving his automobile into the State entails any such consequence. However this may be, we do not think, if we may respectfully say so, that considerations of this character are helpful or even relevant. In Kane *vs.* New Jersey the Court did not acquire jurisdiction because the defendant had failed to appoint the Secretary of State his agent; but because and only because he was arrested within the State whose law he had broken. He might have driven from New York to Philadelphia repeatedly, after his unfortunate but salutary experience, but if he had not been apprehended in New Jersey, its Court could not have obtained jurisdiction to convict and fine him by serving its warrant of arrest upon the Secretary of State.

But assuming a case in point under the New Jersey Statute, the assertion of jurisdiction there may readily be justified in theory because there would be the defendant's actual express authority for the substituted service under the Statute.

To imply the consent of an absent non-resident from his prior conduct is, we submit, a radical departure from established theories of jurisdiction and the authorities upon which the learned Court below relies do not go to this extent. The State can insist that a non-resident automobile owner shall take out a license and may reasonably condition its issuance. It is not unreasonable to require that he shall appoint an agent. If he does not comply, he violates the law and may be punished when apprehended. Hendrick *vs.* Maryland, and Kane *vs.* New Jersey, go no further than this and the question of jurisdiction was not involved in either of them.

If the non-resident appoints an agent, of course the agent may be served; but does it follow that such an

appointment may be presumed and jurisdiction obtained by a fiction drawn from an analogy which this Court has held to be no true analogy? The short answer is that in the one case he appoints an agent and in the other he does not. From a violation of the law a compliance with it cannot be implied.

The requirements of "due process" cannot be evaded by the plea of "police power." Assuming that that power may properly be asserted in the regulation of motor travel upon its highways by a State, its exercise cannot extend beyond the State borders. To uphold this Statute would seem to involve the assumption by the Commonwealth of Massachusetts of a power to summon out of another State a citizen of that State into the Massachusetts courts. The statement of this proposition is its own refutation. If Massachusetts has this power, other states also have it and, if Pennsylvania claimed it, we should have a situation wherein each state exercised a power over the citizens of the other inconsistent with any theory of sovereignty.

Nothing is upheld in this Statute except the sovereign power of the State of Massachusetts. No authority, no reasoning, no analogy can support such a usurpation of sovereignty. As we have seen, service of process made upon the agent of a corporation is based, although the language of the decisions often obscures the real foundation of jurisdiction, upon the sound theory of presence within the State. It is apparent that the attempted service of process cannot be supported on this analogy for the insurmountable barrier of Article IV, Section 2, of the Constitution of the United States intervenes to render the service invalid and a judgment founded thereon unenforceable.

Nor can the State of Massachusetts use its constitutional power by way of condition to obtain an unconstitutional result.

In **Terral vs. Burke Construction Company,** 257 U. S. 529 (1922), it was held that a State law, which revokes the license of a foreign corporation to do business within the State because, while doing only a domestic business within the State, it resorts to the Federal court sitting

therein, is unconstitutional. This decision, conceding that prior cases on the subject could not be reconciled, overruled Doyle *vs.* Continental Ins. Co., 94 U. S. 535, and Security Mutual Life Insurance Co. *vs.* Prewitt, 202 U. S. 246, and announced that the views of the minority judges in those cases had become the law of this Court.

In the Prewitt case Mr. Justice Day, dissenting, said (p. 267):—

> "For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this Court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution."

A recent enunciation of the principle that the constitutional power of the State cannot be used by way of condition to reach an unconstitutional result is found in **Frost Trucking Co. vs. R. R. Commission of California,** 271 U. S. 583 (1926).

There under a Statute of California as construed and applied by the State Supreme Court, private carriers by automobile for hire could not operate over the State highways between fixed termini without having first secured from the Railroad Commission a certificate of public convenience and necessity, and then they not merely became subject to regulations appropriate for private carriers but submitted themselves to the condition of becoming common carriers and of being regulated as such by the Commission.

It was held by this Court that the Statute as construed by the Court below violated the right of the plaintiffs in error as guaranteed by the "due process" clause of the Fourteenth Amendment and that the State could not affix to the privilege of using the public highways the unconstitutional condition precedent imposed.

Citing with approval the dissenting views of the minority judges in the Doyle and Prewitt cases, *supra,* Mr. Justice Sutherland said (p. 593):—

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

(P. 508):—

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it. In Western Union Tel. Co. *vs.* Foster, *supra*, two telegraph companies were engaged in transmitting the quotations of the New York Stock Exchange among the states. This was held to be interstate commerce, and an order of the Public Service Commission of Massachusetts, requiring the companies to remove a discrimination, was held to infringe their constitutional rights. One of the grounds upon which the order was defended was that it rested upon the power of the state over the streets which it was necessary for the telegraph to cross. That contention was answered broadly (p. 114):

"'But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States *vs.* Reading Co., 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Co. *vs.* Kansas, 216 U. S. 1; Pullman Co., *vs.* Kansas, 216 U. S. 56; Sioux Remedy Co. vs. Cope, 235 U. S. 197, 203. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified under that somewhat ambiguous term of police powers.'"

The State of Massachusetts does not, as it might in the exercise of its constitutional powers, say to non-residents, "You may not operate an automobile in this State unless you appoint an agent." Stripped of the fiction the enactment comes to this: "If you operate an automobile within this State, you may be sued here for any damage you have done and our courts shall have power to render a personal judgment against you, although there has been no service of process upon you."

Since the State cannot impose an unconstitutional condition upon its consent to the performance of an act which it has the right to forbid; and since the right to personal service, as an essential to a valid personal judgment, is protected by the "due process" clause; it follows that, as the State could not deprive the plaintiff in error of this right directly, it cannot do so indirectly by aid of a fictional implication. For such an implication differs in no way from a substantive enactment abolishing the constitutional requirement of personal service of process within the jurisdiction.

Although the Constitutionality of this statute must depend upon accepted principles of jurisdiction, the Court below urges very forcibly the dangers of the highway attendant upon motor travel and the hardship upon those

injured by the negligent or wanton misconduct of a non resident in being compelled to seek redress in a distan forum. These are weighty evils but considerations o hardship may be urged with equal force to the contrary The juries of today are notoriously swayed by sympath in personal injury cases to the utter disregard of th evidence. A non-resident, perhaps thousands of mile away from the source of the process, furnishes an eas target for the litigious. In short an attempt to relie one hardship will only result in the infliction of anothe and why a plaintiff in cases of this character should b favored with a remedy which plaintiffs in other circum stances do not possess, is not altogether clear.

Nor will a refusal to approve the provisions of thi Statute deprive a plaintiff of an exclusive remedy; he ma always serve the non-resident, should the latter appea within the State, his remedies at the domicile of the de fendant or at the situs of his property remain as effectiv as before, and in cases involving criminality, the powe of the State in which the criminal seeks refuge may b invoked to secure his return to the State whose law h has violated.

The submission is that the Statute here under considera tion is repugnant to the Constitution of the United State because it deprives the plaintiff in error of rights secure to him thereby and consequently the judgment of th Superior Court of Massachusetts, sustaining the validity o the Statute, is reviewable here upon writ of error an ought to be reversed.

Respectfully submitted,

GEORGE GOWEN PARRY,
Of Counse

WHITE, PARRY, SCHNADER & MARIS,
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Counsel for Plaintiff in Error.

APPENDIX.

CHAPTER 431—ACTS OF 1923 (MASS.)

AN ACT FURTHER REGULATING THE RIGHT OF NON-RESIDENTS TO OPERATE MOTOR VEHICLES WITHIN THE COMMONWEALTH.

Be it enacted, etc., as follows:

Section 1. Section three of chapter ninety of the General Laws is hereby amended by inserting at the beginning thereof the words:—Subject to the provisions of section three *A*,—so as to read as follows:—*Section 3.* Subject to the provisions of section three *A*, a motor vehicle or trailer owned by a non-resident who has complied with the laws relative to motor vehicles and trailers, and the operation thereof, of the state or country in which he resides may be operated on the ways of this commonwealth without registration except as otherwise provided in section ten; provided, that said state or country grants similar privileges to residents of this commonwealth; this section, however, shall be operative as to a motor vehicle or trailer owned by a non-resident only to the extent that under the laws of the foreign country or state of his residence like exemptions and privileges are granted to motor vehicles and trailers duly registered under the laws of and owned by residents of this commonwealth; and the registrar shall determine what states or countries grant similar privileges and the extent of the privileges so granted, and his determination shall be final. The registrar may suspend or revoke the right of any non-resident operator to operate in this commonwealth, and may suspend or revoke the right of any owner to operate or have operated in this commonwealth any motor vehicle or trailer for the same causes and under the same conditions that he can take such action regarding resident owners, operators, motor vehicles and trailers owned in this commonwealth. Every such vehicle so operated shall have displayed upon it two number plates, substantially as provided in section six, bearing

the distinguishing number or mark of the state in which the owner thereof resides, and none other until the vehicle is registered in accordance with this chapter. A motor vehicle or trailer so owned may be operated also in this commonwealth during the months of July, August and September in any one year if application for the registration thereof is made in accordance with section two, and the vehicle is duly registered by the registrar or his authorized agent. The registrar shall furnish at his office, without charge, to every person whose automobile is registered as aforesaid two number plates of suitable design, each of which shall have displayed upon it the register number assigned to such vehicle. Such number plates shall be valid only during the period of time for which they are issued. Every such registration shall expire at midnight on September thirtieth in each year.

Section 2. Said chapter ninety is hereby amended by inserting after section three the two following new sections:—*Section 3 A.* The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor-vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resi-

dent; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. *Section 3 B.* The fee of two dollars paid by the plaintiff to the registrar at the time of the service shall be taxed in his costs if he prevails in the suit. The registrar shall keep a record of all such processes, which shall show the day and hour of service.

Approved May 22, 1923.

The rights and privileges conferred by Section 3 of Chapter 90, General Laws, include the right of non-resident owners who have complied with the laws of their own domiciles relative to motor vehicles, to operate a motor vehicle on the highways of this Commonwealth without registration provided that the State or Country of their domicile grants similar privileges to residents of this Commonwealth, and only to the extent that under the laws of such State or Country like privileges are granted to owners of motor vehicles resident in this Commonwealth.

Section 4 of Chapter 90, General Laws, refers to privileges granted to owners of motor vehicles who live within fifteen miles of the State line.

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted] 263

H. W. HESS, PLAINTIFF IN ERROR

vs.

LEO PAWLOSKI, MINOR, PROCEEDING BY HIS FATHER AND NEXT FRIEND, STANISLAW PAWLOSKI

WRIT OF ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS SITTING IN WORCESTER COUNTY

BRIEF ON BEHALF OF LEO PAWLOSKI

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 876

H. W. HESS, PLAINTIFF IN ERROR

vs.

LEO PAWLOSKI, MINOR, PROCEEDING BY HIS FATHER AND NEXT FRIEND, STANISLAW PAWLOSKI

WRIT OF ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS SITTING IN WORCESTER COUNTY

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BRIEF ON BEHALF OF LEO PAWLOSKI

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the Supreme Judicial Court of Massachusetts, to which court this case was taken on a report and the plaintiff in error's exceptions, are reported in 250 Mass. 22 and 253 Mass. 478, respectively. Both opinions are printed in full at R. 18-25.

GROUNDS OF JURISDICTION

1

This writ of error to the Superior Court of Massachusetts relates to a judgment rendered there on November 2nd, 1925, against the plaintiff in error in an action at law. R. 16. This action was commenced by service of the writ on the Registrar of Motor Vehicles in Massachusetts as the agent of the plaintiff in error and by mailing to the plaintiff in error to his home in Philadelphia, Pennsylvania, by registered mail a copy of the writ, both of which steps were as provided for by General Laws of Mass. 1921 c. 90 as amended by section 2 of ch. 431 of the Acts of 1923, R. 5–8. The plaintiff in error contended this service of process was invalid and filed an answer in abatement and a motion to dismiss the action setting forth that such service, although in accord with the statute, was contrary to section 1 of the Fourteenth Amendment to the U. S. Constitution, R. 9–10. The correctness of the presiding justice's ruling in favor of the validity of the statute on the question thus raised was reported to the Supreme Judicial Court of Massachusetts for determination on January 21, 1924, R. 11. Argument was had before the Supreme Judicial Court on March 12, 1924. A rescript, so-called, affirming the ruling of the justice of the Superior Court, was filed September 20, 1924. The opinion of the Supreme Judicial Court is printed in full, R. 18.

Trial was then had, April 3, 1925, before a jury, and a verdict rendered in favor of the plaintiff (defendant in error) in the sum of Five Hundred ($500.) Dollars, R. 14. Exceptions were taken to the sufficiency of evidence presented at the trial and further to the constitutionality of the service of process, R. 13. These exceptions were overruled by the Supreme Judicial Court on October 17, 1925, R. 16. The writ of error was allowed by Hall, C. J., of the Superior Court on December 18, 1925, and filed January 9, 1926.

2

The specific claims advanced, and the rulings made in the lower court which presumably are relied upon as the basis of

this court's jurisdiction are, generally, that the judgment of the Superior Court drew in question the validity of a statute of Massachusetts or an authority exercised under said State, on the ground of being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; that the right of the plaintiff in error to due process of law was denied by the Superior Court upon the issues raised by his plea in abatement and motion to dismiss and by his exceptions taken at the trial. These claims appear in the assignment of errors, R. 1–2.

3

The writ of error is presumably based upon section 237 of the Judicial Code as amended by the Congressional Act of February 13, 1925, c. 229, 43 U. S. Stat. at Large 937, 938.

STATEMENT OF THE CASE

This is an action of tort brought by Leo Pawloski, a minor proceeding by his father and next friend Stanislaw Pawloski, a resident of Worcester in the State of Massachusetts, against H. W. Hess, a resident of Philadelphia in the State of Pennsylvania, seeking to recover compensation for personal injuries received by the plaintiff while a traveler upon a public highway in said Worcester, by reason of the negligent or wanton misconduct of the defendant in driving a motor vehicle in that city. Service was made upon the defendant by delivery of a precept in hand to the Registrar of Motor Vehicles of the State of Massachusetts, R. 6 and by sending a copy of the precept and notice of such service by registered mail to the defendant in Philadelphia in the State of Pennsylvania. The defendant's return receipt therefor with an affidavit that such service was made was entered with the writ and declaration in this case and made part of the record, R. 8. Service obtained in this manner is in accordance with the Provisions of Chapter 431 of the Massachusetts Acts of 1923 amending the Massachusetts General Laws, Chapter 90, Section 3, the material portion of which is in these words:

"Section 3A. The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

Section 3B. The fee of two dollars paid by the plaintiff to the registrar at the time of the service shall be taxed in his costs if he prevails in the suit. The registrar shall keep a record of all such processes, which shall show the day and hour of service."

The defendant appearing specially filed an answer in abatement and a motion to dismiss the action, contending

that service in accordance with the statute just quoted is invalid. R. 9, 10. Both the answer in abatement and the motion to dismiss were argued before a justice of the Superior Court in session without a jury at said Worcester on January 14, 1924. On January 17, 1924, an order was entered denying the motion to dismiss and overruling the answer in abatement. R. 9, 10. The case was then reported to the Supreme Judicial Court of Massachusetts for the determination of the question of the court's jurisdiction. R. 11. On March 12, 1924, the report was argued in the Supreme Judicial Court of Massachusetts, and on September 20, 1924, an opinion was filed affirming the order denying the motion to dismiss and overruling the answer in abatement. This opinion is reported in 250 Mass. 22. R. 18. The case was then tried before a jury in the Superior Court in said Worcester, and on April 3, 1925, a verdict was returned for the plaintiff in the sum of Five Hundred ($500.00) Dollars. R. 13.

At the trial the defendant, still resisting the jurisdiction of the Superior Court in said Worcester, by his attorney cross-examined witnesses of the plaintiff and asked for a directed verdict for the defendant on the ground that on all the evidence the plaintiff was not entitled to recover and that the service was unconstitutional and the Court was without jurisdiction. R. 15. On September 22, 1925, these exceptions were argued before the Supreme Judicial Court of Massachusetts, then holden at Worcester, Massachusetts. On October 16, 1925, in an opinion rendered by the Supreme Judicial Court of Massachusetts, the defendant's exceptions were overruled and the verdict for the plaintiff allowed to stand. This opinion is reported in 253 Mass. 478. R. 25. Judgment on the verdict was entered in the Superior Court at Worcester, Massachusetts, on November 2, 1925, R. 16. Thereafter the case was brought to this court by a writ of error returnable to this court on January 11, 1926, assigning, in substance, that there was error in deciding in the Massachusetts courts that General Laws of Massachusetts, c. 90 section 3, as amended by section 2 of c. 431 Acts of Mass. 1923, was not in contravention of the United States Constitution, particularly section I of

Article XIV of the amendments thereto and of Article 4, section 2, and that service on the defendant in compliance with the provisions of the statute was valid service. R. 3.

ARGUMENT

Summary

I

There was no error in denying the defendant's (plaintiff in error's) motion to dismiss the action and in overruling the defendant's (plaintiff in error's) answer in abatement, as is claimed in the first and second assignment of error, and the statute in this case is constitutional because:

A

It does not create or permit the exercise of any new substantive right or any advantage or discrimination.

B

It provides full opportunity for a hearing and defense to the defendant.

C

Such opportunity for a hearing and defense had been taken full advantage of by the defendant in this case and the first two assignments of error do not disclose any violation of due process on this score.

II

There was no error in the exceptions reserved by the plaintiff in error and set forth in detail in the third, fourth and fifth assignment of error.

A

Jurisdiction over a defendant in personal actions may be obtained by constructive as well as personal service.

B

Consent is a valid basis for jurisdiction. In the interest of justice such consent may be implied from specific acts done within a state. This doctrine has been repeatedly applied to foreign corporations. As to jurisdiction, consent may be equally well implied from specific acts performed by the non-resident individual within the state.

C

The proprietary power of a state over its highways implies jurisdictional control over users of the same, non-resident as well as resident.

D

A means of affixing legal liability upon non-resident motorists for torts arising out of the use of the highways of a state is essential to public safety and is not arbitrary, unreasonable or spoilative.

III

There was no error in holding that the Massachusetts statute did not constitute a denial to the defendant (plaintiff in error) of the privileges and immunities of the citizens of Massachusetts contrary to Article 4, Section 2 of the Constitution, as claimed by the sixth assignment of error since:

A

Citizens of Massachusetts are liable in its courts in cases arising out of automobile collisions on its highways, and the non-resident motorist stands in no better position by virtue of any guarantee in Article IV of the U. S. Constitution.

ARGUMENT

I

There was no error in denying the defendant's (plaintiff in error's) motion to dismiss the action and in overruling the defendant's (plaintiff in error's) answer in abatement, as is claimed in the first and second assignment of error. R. 2.

Both the motion to dismiss the action and the answer in abatement attacked the jurisdiction of the Court over the defendant (plaintiff in error) on the ground that the statute in accordance with which service on the defendant was made, was contrary to Article I of the Fourteenth Amendment to the Federal Constitution. R. 2–3. It is submitted that there is no merit in this contention.

A

The statute brought in question in this case does not involve the creation of any new rights, but merely facilitates the enforcement of an existing right to obtain redress at law. Such a statute is constitutional.

At common law a defendant in a civil case had all his rights protected when he was given notice of the suit and an opportunity to defend in a proceeding conducted in a court of law under the established rules of the same. It is difficult to conceive of any instance wherein the statute in question infringes upon these rights of the defendant (plaintiff in error). In one of the earliest cases involving due process of law it was said:

> "It is not unconstitutional to provide a new or additional remedy for a just right already in being, and which would be lost or destroyed if no remedy were provided."

Hope vs. Johnson 2 (Yerg) Tenn. 123, 125 (1826).
Becquet vs. McCarthy 2 B & Ad. 951, 959 (1831)
109 Eng. Reprint 1396, 1399 (1831).

The appearance of the Fourteenth Amendment in our fundamental law did not change this early concept, for it was clear that, were it otherwise, in suits such as this, local in their nature, "in many instances the cost of the remedy would" largely exceed "the value of its fruits—The result would be, to a large extent, immunity from all legal responsibility."

Railroad vs. Harris 12 Wall 65, 84 (1870).

As was observed,

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line . . . Each state prescribes its own mode of judicial proceeding." Mr. Justice Bradley in

Missouri vs. Lewis 101 U. S. 22, 31 (1879).

In fact, the correctness of these general propositions has never been questioned since the case of Hurtado vs. California, where it was said:

> "There is nothing the Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the

sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative powers in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Hurtado vs. California 110 U. S. 516 at 531, 537 (1884).
Holden vs. Hardy 169 U. S. 366, 385 (1898).

The Fourteenth Amendment passed at a time when it was thought desirable to secure persons against discrimination, never contemplated that it should serve as a restriction upon aggrieved persons within a state or their remedies. The protection provided did not so shear a state of its powers as to compel it to afford legal immunity to the non-resident motorist in such a case as the one at bar.

"The Fourteenth Amendment itself a historical product, did not destroy history for the States and substitute mechanical compartments of law exactly alike." Mr. Justice Holmes in

Jackman vs. Rosenbaum Co. 260 U. S. 22, 30 (1922).
Cooley: Constitutional Limitations (6th ed.) 511 fol.
Cong. Globe 39th Congress 1st Ses. Pt. 4—p. 2542.
Cf. Ex parte Bain 121 U. S. 1 at 12 (1887).

B

"The fundamental requirement of due process is an opportunity for a hearing and defense, but no fixed

procedure is demanded. The process or proceedings may be adapted to the nature of the case."

Ballard vs. Hunter 204 U. S. 241, 255 (1906).

The statute here assailed expressly recognizes the substantive right of the non-resident automobilist to contest any liability arising out of the operation of an automobile on the highways of Massachusetts and to defend himself in the Courts of that State. It provides for continuances so that he may be heard at his convenience, and also for direct notice to the defendant by registered mail. The Court obviously by the terms of the statute would not take jurisdiction unless the non-resident's registered mail return receipt was placed in the record of the case to show that notice of the proceedings had actually been received by such non-resident. The statute does not attempt to deprive a non-resident of his property by any summary proceedings, but only upon due and proper hearing in such form and manner as is accorded by due process of law to its own residents. Fundamentally a plaintiff has just as clear a natural right to ask that the law permit a trial where he, the victim of the alleged wrong, resides, as the defendant has that the trial be in his county or state. Forms of procedure seeking to obviate any difficulty in this respect, which do not infringe upon the substantive rights involved, are constitutional.

Allen vs. Smith 84 Ohio State 283, 295 (1911).
St. Louis B. & M. Ry. vs. Taylor 266 U. S. 201 (1924).

A more specific consideration of the nature of the process provided by the statute in question leads to a similar conclusion, namely, that individual right protected by the Fourteenth Amendment has not been invaded. The objection raised is really one of form and not of substantive right. And as to this, it cannot be seriously contended that the Fourteenth

Amendment exacts anything more than that there be an opportunity for a hearing and defense.

The defendant (plaintiff in error) has not taken pains to specify in these first two assignments of error what right of his, granted or secured by the Supreme law of the land, has been violated. Certainly not that his right to a hearing and defense was violated. The defendant (plaintiff in error) had direct notice of the proceedings, R. 9. That he took advantage of his opportunity for a hearing and defense is manifest from the record which shows that by his counsel he cross-examined witnesses for the plaintiff and excepted to their evidence on the merits in this case, which exceptions were argued and overruled, R. 15 and R. 25.

Pawloski vs. Hess 253 Mass. 478, 479 (1925).

C

The statute here attached does not abridge the privileges or immunities of citizens of the United States.

The privileges and immunities of citizens of the United States are those which owe their existence to the Federal Government, its national character, its Constitution or its laws, and it is only these privileges and immunities that are placed by this Amendment under the protection of Congress. This clause of the Fourteenth Amendment did not transfer the security of a citizen's civil rights from the states to the Federal Government. Moreover, the highways of the State, to which the statute applies, are controlled by the State under its own sovereign power and not under any delegated power of the Constitution.

> "Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each State, of powers never surrendered to the General Government, which power the State, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the

> public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people." Per Mr. Justice Harlan.
>
> Western Turf Ass'n. vs. Greenberg 204 U. S. 360, 363 (1906).

The States have always enjoyed this authority. Hence the privilege of using the highways of a state by motor vehicles never was nor ever can be, under our fundamental law, a privilege common to all United States citizens, by virtue of such citizenship.

> Slaughter House Cases 16 Wall U. S. 36, 72 fol. (1872).
> New Orleans Gas Co. vs. La. Gas Co. 115 U. S. 650, 661 (1885).
> Blake vs. McClung 172 U. S. 239 at 249 (1898).
> Maxwell vs. Dow 176 U. S. 581 at 593 (1899).
> Twining vs. New Jersey 211 U. S. 78, 99 (1908).
> Maxwell vs. Bugbee 250 U. S. 525 at 537 (1919).

It is true that Congress alone has the power to regulate commerce among the several states. In this case, however, no claim is made by the defendant (plaintiff in error) that he was engaged in interstate commerce. Clause 8 of Article 1 of the United States Constitution conferring this power of regulation on Congress, is nowhere drawn in question on the record of this case. No contention can therefore be made involving privileges of United States citizens on this score. Moreover, it has been definitely held by this Court that:

> "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor

vehicles—those moving in interstate commerce as well as others."

Hendrick vs. Maryland 235 U. S. 610 at 622 (1914).
Kane vs. New Jersey 242 U. S. 160, 167 (1916).
Buck vs. Kuykendall 267 U. S. 307, 315 (1924).
Michigan Commission vs. Duke 266 U. S. 570, 576 (1924).

D

The contention further, that the statute is contrary to the Fourteenth Amendment because it violates the "due-process-of-law" clause may be best disposed of in the consideration of the third, fourth and fifth assignments of error. R. 3, where that issue is more pointedly raised. To avoid repetition, consideration of these follow.

II

There was no error in the exceptions reserved by the plaintiff in error and set forth in detail in the third, fourth and fifth assignment of error, R. 3.

These are in substance to the effect that it was a denial of due process of law to the defendant (plaintiff in error) to rule that service in accordance with the statute was valid and that the Court acquired jurisdiction.

A

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun. Submission to the jurisdiction of the court by appearance or otherwise may take the place of personal service.

McDonald vs. Mabee 243 U. S. 90, 91 (1917).
Cf. 12 Geo. I c. 29
4 Bl. Comm. p. 279-284.

Taking this as basic, a court obtains jurisdiction in personal actions in four well known ways:

(a) By personal service upon residents.
(b) By personal service upon a non-resident within the state.
(c) By the publication of process against residents and non-residents.
(d) By consent or agreement of the parties to submit to the jurisdiction of the Court.

This last method is under question in this case. That jurisdiction by the consent of a defendant is valid, is universally admitted. The only difficulty in this respect is to establish what is meant by consent. It has been held that such consent may be manifested

(1) By voluntary appearance in the suit or by agreement before hand, as to the Court in which the suit is to be tried.

York vs. Texas 137 U. S. 15 (1890).
Western Life Ins. Co. vs. Rupp 235 U. S. 262 (1914).
Harris vs. Taylor (1915) 2 K. B. 580.
Chicago Ins. Co. vs. Cherry 244 U. S. 25 (1917).
Davis vs. Weschsler 263 U. S. 22 (1923).
Davis vs. O'Hara 266 U. S. 314 (1924).

(2) By implied consent.

Pennoyer vs. Neff 95 U. S. 714 Esp. at 735 (1877).
St. Claire vs. Cox 106 U. S. 350 at 356 (1882).
Smolik vs. Phila. Coal & Iron Co. 222 Fed. 148 (1915).
Kane vs. New Jersey 242 U. S. 160 (1916).
Hunau vs. No. Region Supply Co. 262 Fed. 181 Esp. at 183 (1920).

B

In the case of foreign corporations doing business within a state, it has been repeatedly held that they have thereby consented to the jurisdiction of the courts of that state upon causes of action arising out of the business done by them within its borders.

This is irrespective of whether there was any actual consent by them to such jurisdiction and irrespective also of whether the particular statute involved required the filing of a power of attorney by the corporation or merely declared that doing business within the state should be deemed equivalent to the filing of such an instrument. As was said by Mr. Justice Hand in Smolik vs. Phila. Coal & Iron Co., 222 Fed. 148 (1915):

> "The court in the interest of justice imputes results to the voluntary act of doing business within a foreign state quite independently of any intent."

Lafayette Ins. Co. vs. French 18 How. 404, (1855).
Pennoyer vs. Neff 95 U. S. 714 Esp. at 735 (1877).
St. Claire vs. Cox 106 U. S. 350 at 356 (1882).
Mutual Reserve Fund Life Ass'n vs. Phelps 190 U. S. 147 (1903).
Pa. Fire Ins. Co. vs. Gold Issue Mining & Milling Co. 243 U. S. 93 (1917).
Reynolds vs. R. R. 255 U. S. 565 (1920).
Mo. Pacific R. R. vs. Clarendon Boat & Oar Co. Inc. 257 U. S. 533 (1923).

It would seem no more difficult to apply this doctrine of implied consent to an individual non-resident than to a foreign corporation, and it is submitted that there should be no distinction made between the two so far as the question of jurisdiction is concerned. In fact, non-residents have been compelled to appoint a public officer as attorney to receive

process as a prerequisite to doing certain kinds of business, in order to prevent fraud or otherwise to protect the public welfare.

Hall vs. Geiger-Jones Co. 242 U. S. 539, 550 (1917).
St. Claire vs. Cox 106 U. S. 350 at 356 (1882).
32 Harvard Law Review 871 at 889 (1919).
33 Harvard Law Review 1 at 12 (1919).

Although it is claimed generally that such an analogy between a corporation and an individual fails, it will be noted that in the case of Flexner vs. Farson 248 U. S. 289 (1919) where such language is used, this Court found as a fact that Washington Flexner was not the agent of the partnership sued when served with process. It was stated also as a fact that the Kentucky code which permitted service on a partnership composed of non-residents doing business in Kentucky, by serving upon its manager or agent in the state, did not provide for substituted or constructive service against residents, thus possibly violating the "privileges and immunities" clause of the Fourteenth Amendment. The case is far from deciding that a state may not validly provide for service of process upon non-residents doing certain kinds of acts or business within the state, by service upon an agent or public official, in actions arising within the state out of such acts committed in the state. It was pointed out by Mr. Justice Holmes in the opinion of the court, that if that is the effect intended by the Kentucky statute, it could not be so enforced on the facts in Flexner vs. Farson, the important items of which were stated above.

Flexner vs. Farson 248 U. S. 289, 293 (1919).
Hall vs. Geiger-Jones Co. 242 U. S. 539, 550 (1917).
People's Tobacco Co. vs. Amer. Tobacco Co. 246 U. S. 79 (1918).
Davis vs. Farmers Co-op. Co. 262 U. S. 312 at 315 (1922).
39 Harvard Law Review 563, 582 and at 585 (1926).

Furthermore, the tenet that consent may be implied in the case of a foreign corporation doing business within a state upon the accepted doctrine that the states could exclude foreign corporations altogether and therefore could establish this obligation as a condition to letting them in, does not spell immunity from legal responsibility for the non-resident individual engaged in specified voluntary acts within the state, just because as to him the state may not so exclude. In International Harvester Co. vs. Kentucky 234 U. S. 579 (1914) it was held that a corporation doing a strictly interstate business, which for that reason could not be excluded from coming within the state, nevertheless by doing such interstate business, was doing business within the state and was therefore subject to the jurisdiction of the state. The right of a non-resident motorist to drive an automobile on the highways of a state is afforded no greater or higher constitutional protection than is the right of a foreign corporation to transact interstate business. If the doing of business may in the one case subject the foreign corporation to the laws of the state by way of substituted service where in fact there has been no consent to the jurisdiction of the courts of such state, there is no sound reason why the driving of a motor vehicle by a non-resident on the highways of the state may not have a like consequence.

Pawloski vs. Hess 250 Mass. 22 (1925).
Pizzutti vs. Wuchter (N. J.) 134 Atl. 727 (1926).
State vs. Belden (Wis.) 211 N. W. 916 (1927).

If there is anything in the argument that a corporation must be subjected to jurisdiction of the courts of a state where it does business and that consent to such jurisdiction may be implied from the corporate act of carrying on business, because it would be intolerable to have a corporation carry on

its activities with immunity outside of its home state and particularly so when a state need not permit such activity except upon the corporation's consent to the jurisdiction of the courts of that state in matters arising out of such activity, then that argument can be made with equal force against the non-resident automobilist, because it is intolerable that such a person can kill or maim by negligent automobile operation without being amenable to the process of the state where his negligent acts occur; because a state, in the absence of national legislation, can prevent such acts by barring non-resident motorists from using its highways for travel by motor vehicles, and where such use is allowed subject to regulations, violators may be penalized.

State vs. Mayo 106 Maine 102 (1901),
Commonwealth vs. Kingsbury 199 Mass. 542 (1908).
Hendrick vs. Maryland 235 U. S. 610 (1914).
Kane vs. New Jersey 242 U. S. 160 (1916).
"Jurisdiction Over Non-Resident Motorists" 39 Harvard Law Review 563 (1926).
34 Yale Law Journal 415 (1925).

C

It seems clear that a state has the power to forbid a non-resident to do acts within the state involving danger to life or property unless he first consents to the exercise of jurisdiction of the courts of the state as to causes of action arising out of those acts.

The driving of a motor vehicle on the highways of a state involves such danger, and if a non-resident avails himself of the statutory privilege of so using the highway, he, by that very act, waives any technical protection in his favor and subjects himself to the same regulations and liabilities as

residents do who use the highway for such travel. This includes submission to the jurisdiction of the courts of the state, or an implication of consent to such from such act of driving.

Kane vs. New Jersey 242 U. S. 160 (1916).
State vs. Sterrin 78 N. H. 220 (1916).
Pawloski vs. Hess 250 Mass. 22, 29 (1925).
Martin vs. Condon (N. J.) 129 Atl. 738 (1926).
Pizzutti vs. Wuchter (N. J.) 134 Atl. 727 (1926).
State vs. Belden (Wis.) 211 N. W. 916 (1927).

In Kane vs. New Jersey Mr. Justice Brandeis who handed down the unanimous opinion of the court, used this illuminating language at page 167:

> "We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. **And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of non-resident owners, was essential to public safety.** There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."

Non residents as well as residents using the highways of a state do so subject to all reasonable regulations enacted in the interest of public safety.

Hendrick vs. Maryland 235 U. S. 610 (1914).
Kane vs. New Jersey 242 U. S. 160 (1916).
Packard vs. Banton 264 U. S. 140 (1923).

It therefore follows that, any usage contrary to such regulations may be prohibited and violators, non-residents as well as residents, penalized by criminal prosecution.

State vs. Mayo 106 Maine 102 (1901).
State vs. Phillips 107 Maine 249 (1902).
People vs. Shneider 139 Mich. 673 (1905).
Scovell vs. Detroit 143 Mich. 93 (1906).
Commonwealth vs. Kingsbury 199 Mass. 542 (1908).
People vs. Roseheimer 209 N. Y. 115, 120 (1913).

It is also unquestioned that while a motorist is within the state no matter for how brief a time, the state has control over him, and if, during such time he is served with process, the court acquires jurisdiction over him unless he is by law specially privileged from service.

Peabody vs. Hamilton 106 Mass. 217 (1870).
Herbert vs. Bicknell 233 U. S. 70 (1912).

Such jurisdictional control over the non-resident motorist need not be lost because he happens to be possessed of an agency that could speed him away over the state or jurisdictional line. It would, indeed, be a revolutionary proposition to hold that as to its own citizens the state might regulate the use of its highways by automobiles, but could not regulate or control the use of such highways by non-residents, and could not protect its own citizens from the dangers which might arise from the unrestricted use of the roads of the state by the automobiles of non-residents, and that thereby the state was powerless to protect either the person or property of its citizens in a particular respect because the automobile creating the danger was possibly on a pleasure run from Boston to Philadelphia. It cannot be supported on any legal theory. On the other hand it is the contention of the defendant in error that the converse of the proposition, namely, that

the legal control of the automobilist on the highways of a state, rests on perfectly sound legal fundamentals.

D

By a legitimate exercise of its police power a state, seeking to promote public convenience and safety on its highways, may provide for the legal control over the motor vehicle itself or the non-resident driver using those highways.

> "Custom and a sense of propriety demand of the individual that he subordinate and adopt the exercise of his rights to manifest social interest and requirements, and the disregard of this obligation appears as a wrong . . . The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty, or of his rights of property, as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous."
>
> Fruend: Police Power Sec. 8.
> Kane vs. New Jersey 242 U. S. 160, 167 (1916).

This principle is well settled and has been expressed in the legal maxims "Salus populi suprema lex" and "Sic utere tuo ut alienum non laedes."

> Broom: Legal Maxims, Page 1, 365.
> Comm. vs. Alger, 7 Cush. (Mass.) 53 at 86 (1853).
> Railroad Co. vs. Richmond, 96 U. S. 521, 528 (1877).
> Grand Trunk R. R. vs. Ives, 144 U. S. 408, 419 (1891).
> St. Louis & San Francisco Ry. vs. Mathews, 165 U. S. 1, 23 (1896).

Under these principles by use of its police power the State of Massachusetts has provided that the actual voluntary

driving of a motor vehicle on the highways of Massachusetts by a non-resident shall be deemed to have the effect of a formal appointment of a designated public officer as agent of the driver to accept process in actions arising out of such use of the State's highways. When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act usually entails those consequences irrespective of motive.

> St. Louis & San Francisco Ry. vs. Mathews, 165 U. S. 1, 23 (1896).
> Jones vs. Brim, 165 U. S. 180, 183 (1896).
> U. S. vs. Balint, 258 U. S. 250, 252 (1921).
> Griffiths vs. Studerbakers, Ltd. (1924), 1 K. B. 102.

Pennoyer vs. Neff, 95 U. S. 714, and the other cases cited in the brief of plaintiff in error, to sustain his contention that jurisdiction cannot be obtained in the manner utilized in this case, in no way involve the question of state police power and are therefore not only distinguishable but inapplicable to the case at bar.

The exercise of such jurisdiction seems to be clearly within the authority of the Kane vs. New Jersey case cited above. If the State of New Jersey may validly provide that the non-resident motorist shall submit himself to the jurisdiction of its courts under penalty of arrest and criminal prosecution, it seems likewise wholly proper for a state to cause a non-resident to submit to the jurisdiction of its courts under penalty of execution of a judgment of its courts against him arising out of any accident or collision in which said non-resident may be involved while operating a motor vehicle upon the highways within such a state. In either instance the same constitutional right is involved. In neither instance is it violated.

Mr. Justice Learned Hand in speaking of the authority of this case said:

> "It has also been said in Kane vs. New Jersey that a State might attach to the right of a motorist

to pass through the State the condition that he shall be subject to process."

Bobe vs. Lloyds, 10 F. (2nd) 730 at 735 (1926).
Pawloski vs. Hess, 250 Mass. 22 Esp. at 29 (1925).
State vs. Belden (Wis.), 211 N. W. 916 (1927).
Pizzutti vs. Wuchter (N. J.), 134 Atl. 727 (1926).

Is the requirement so unreasonable as to deny the non-resident due process of law? Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by consideration of the conditions to be affected. Resort to such facts is necessary in order to appreciate the evil sought to be remedied. Nearly all legislation involves a weighing of public needs as against private desires. It must be considered that in an increasing measure, persons spend a large portion of their time in travelling in motor vehicles from state to state, many of them making their homes in their automobiles.

Controlling the use of automobiles by affixing upon them who operate financial liability for injuries wilfully or negligently caused and by providing a convenient method of enforcing such liability in the courts of a state, has been held not unreasonable or arbitrary.

Kane vs. New Jersey, 242 U. S. 160 at 167 (1916).
Packard vs. Banton, 264 U. S. 140 (1923).
Pawloski vs. Hess, 250 Mass. 22 (1925).
Martin vs. Condon, 129 Atl. 738 (1926).
Pizzutti vs. Wuchter (N. J.), 134 Atl. 727 (1926).
State vs. Belden (Wis.), 211 N. W. 916 (1927).
Cf. Opinion of the Justices, 251 Mass. 594, 596 (1925).

The whole second section of the brief of the plaintiff in error is devoted to an argument that acts which are generally lawful become unlawful when done to accomplish an

unlawful end. He admits thereby the converse of the proposition namely: that acts in some circumstances unlawful may be lawful when done to achieve a lawful result.

> "Moreover a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."
>
> Packard vs. Banton, 264 U. S. 140, 145 (1923).

On this point the defendant in error claims nothing more than this: **If a state may, without violating any constitutional limitation, forbid the doing of certain kinds of acts within the state unless and until the person doing the acts has consented to the jurisdiction of the courts of the state as to causes of action arising out of such acts, the state may validly provide that the doing of such acts shall subject him to the jurisdiction of the courts of the state as to such causes of action.**

It is respectfully submitted that this is the rule of Kane vs. N. J., 242 U. S. 160 and the basis on which the validity of the act in this case should be upheld.

The form of service in this case is calculated to give the non-resident motorist full notice and an ample opportunity for defense. Preserving these rights, a state is wholly within its power, in providing methods of procedure, on the fundamental principles discussed in the first part of this brief.

> "As the law is, that the process shall be served upon the public officer, . . . we cannot take upon ourselves to say that the law is so contrary to

natural justice as to render the judgment void in a case where the process is so served."

Becquet vs. MacCarthy, 2 B. & Ad. 951 at 959 (1831), 109 English Reprint 1396, 1399 (1831).

"Neither do we mean to assert that a State may not require a non-resident or association within its limits to appoint an agent in the state to receive process. Judgments rendered upon such service are binding upon non-residents both within and without the state" . . . "In the present case (Pennoyer vs. Neff) there is no feature of this kind."

Pennoyer vs. Neff, 95 U. S. 714 at 735 (1877).

"We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon a non-resident is not always within a state's power. Its process is limited by its boundaries constructive service is at times a necessary recourse."

Ballard vs. Hunter, 204 U. S. 241 at 254 (1907).

"It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Mr. Justice Stone in Missouri vs. North, 271 U. S. 40, 41 (1926).

III

There was no error in holding that the Massachusetts statute did not constitute a denial to the defendant (plaintiff in error) of the privileges and immunities of the citizens of Massachusetts contrary to Article 4, Section 2 of the Constitution as claimed by the sixth assignment of error.

A

There is no right secured to the defendant (plaintiff in error) in this case which has been pointed out as secured by Paragraph 1 of Section 2 of Article 4 of the Federal Constitution. This clause has been interpreted by Judge Cooley in his Constitutional Limitations, 7th Ed. Page 569, as follows:

> "It appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcements of other personal rights; and the right to be exempt in property and person from taxes or burdens which the property or persons, of citizens of the same state are not subject to."

This has been accepted as the substantial meaning of that clause and has been quoted with approval by Mr. Justice Day in Maxwell vs. Bugbee 250 U. S. 525, 537 (1919).

It is difficult to ascertain from the assignment of error which one of the above named rights the defendant (plaintiff in error) claims to have been violated. As was noted in the first part of this brief, the statute here assailed does not involve the creation of any new substantive rights. Going further, the law in question does not differentiate between

the citizens of the State of Massachusetts and the citizens of any other state. All are equally compelled to obey the regulations concerning motor travel and all are equally liable in its courts. All equally use the highways for such travel not of right but by license or permission.

> "It is not a discrimination against non-residents denying them equal protection of the law, on the contary, it puts non-residents upon an equality with resident owners."
>
> Kane vs. New Jersey 242 U. S. 160, 167 (1916).
> Chalmers vs. B. & O. R. R. 207 U. S. 142, 149 (1907).

It therefore seems needless to argue further on this point. The action of the state must be treated as correct unless the contrary is clearly made to appear. Every presumption is to be indulged in favor of the validity of the statute.

> Hendrick vs. Maryland 238 U. S. 610 at 624 (1914).
> U. S. vs. Jin Fuey 241 U. S. 394, at 401 (1916).
> Graves vs. Minnesota 47 Sup. Ct. 122 at 123 (1926).
> Interstate Bus. vs. Holyoke St. Ry. Co. 47 Sup. Ct. 298 (1926).

No error of law prejudicial to the fundamental rights of the plaintiff in error, is disclosed in the record. The Supreme Judicial Court of Massachusetts heard substantially the same arguments as those addressed to this Court. In an able opinion the validity of the statute here involved was upheld and it is respectfully submitted that the writ should be dismissed with costs and execution issue.

Sec. 237 Judicial Code as Amended 43 U. S. Stat. 937, 938.

Respectfully submitted,

HARRY JOHN MELESKI,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1926.

H. W. Hess, Plaintiff in Error, *vs.* Leo Pawloski. } In Error to the Superior Court of Worcester County, Massachusetts.

[May 16, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

This action was brought by defendant in error to recover damages for personal injuries. The declaration alleged that plaintiff in error negligently and wantonly drove a motor vehicle on a public highway in Massachusetts and that by reason thereof the vehicle struck and injured defendant in error. Plaintiff in error is a resident of Pennsylvania. No personal service was made on him and no property belonging to him was attached. The service of process was made in compliance with c. 90, General Laws of Massachusetts, as amended by Stat. 1923, c. 431, § 2, the material parts of which follow.

"The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and

entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action."

Plaintiff in error appeared specially for the purpose of contesting jurisdiction and filed an answer in abatement and moved to dismiss on the ground that the service of process, if sustained, would deprive him of his property without due process of law in violation of the Fourteenth Amendment. The court overruled the answer in abatement and denied the motion. The Supreme Judicial Court held the statute to be a valid exercise of the police power, and affirmed the order. 250 Mass. 22. At the trial the contention was renewed and again denied. Plaintiff in error excepted. The jury returned a verdict for defendant in error. The exceptions were overruled by the Supreme Judicial Court. 253 Mass. 478. Thereupon the Superior Court entered judgment. The writ of error was allowed by the chief justice of that court.

The question is whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.

The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer* v. *Neff*, 95 U. S. 714. There must be actual service within the State of notice upon him or upon some one authorized to accept service for him. *Goldey* v. *Morning News*, 156 U. S. 518. A personal judgment rendered against a non-resident who has neither been served with process nor appeared in the suit is without validity. *McDonald* v. *Mabee*, 243 U. S. 90. The mere transaction of business in a State by non-resident natural persons does not imply consent to be bound by the process of its courts. *Flexner* v. *Farson*, 249 U. S. 289. The power of a State to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, 96. But a State may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the Constitution, § 2, Art. IV, safeguards to the citizens of one State the right "to pass through, or to reside in any other state for purposes of trade, agriculture,

professional pursuits, or otherwise." And it prohibits state legislation discriminating against citizens of other States, *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 381; *Ward* v. *Maryland,* 12 Wall. 418, 430; *Paul* v. *Virginia,* 8 Wall. 168, 180.

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern Ry. Co.* v. *Eggen,* 252 U. S. 553, 561-562. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick* v. *Maryland,* 235 U. S. 610, 622. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane* v. *New Jersey,* 242 U. S. 160, 167. That case recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. Cf. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co., supra,* 96; *Lafayette Ins. Co.* v. *French,* 18 How. 404, 407-408. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment.

Judgment affirmed.